(5)

No. 95-1605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

MIGUEL GONZALES, ORLENIS HERNANDEZ-DIAZ, AND MARIO PEREZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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Petition for a Writ of Certiorari Filed April 4, 1996
Certiorari Granted June 17, 1996

164 pp

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Mario Perez

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U.S. DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO (ALBUQUERQUE)

CRIMINAL DOCKET FOR CASE #: 92-CR-236-ALL

USA v. Leon, et al — Filed: 05/08/92
Dkt# in other court: None

Case Assigned to: Judge John E. Conway

LUIS LEON (1)	Alonzo J. Padilla, Esq. [term 10/06/93] [COR LD NTC cja] Alonzo Padilla Law Office 320 Gold Avenue, SW #1440 Albuguerque, NM 87102 (505) 843-9629
12/23/67;000-00-0000 defendant [term 10/06/93]	

Pending Counts:	Disposition
21:846 CONSPIRACY (1)	CBOP 60 months concurrent with State sentence; 3 years supervised release; with special conditions; SPA $150.00; deft held in custody (1)
18:924(c)(1) & 18:924 (a)(2) POSSESSION OF A FIREARM IN USE OF A DRUG TRAFFICKING CRIME (4)	CBOP 60 months concurrent with State sentence; 3 years years supervised release; with special conditions; SPA $150.00; deft held in custody (4)

21:841(a)(1) & 21:841(b)(1)(D) POSSESSION WITH INTENT TO DISTRIBUTE LESS THAN 50 KILOGRAMS OF MARIJUANA; 18:2 AIDING AND ABETTING (6)	CBOP 60 months concurrent with State sentence; 3 years supervised release; with special conditions; SPA $150.00; deft held in custody (6)

Offense Level (opening): 4

Terminated Counts:

NONE

Complaints:

NONE

Case Assigned to: Judge John E. Conway

ORLENIS HERNANDEZ-DIAZ (2) defendant [term 10/06/93]	Angela Arellanes, Esq. [term 10/06/93] (505) 247-2417 [COR LD NTC cja] 800 Park Avenue, SW Albuquerque, NM 87102 (505) 842-5808

Pending Counts:	Disposition
21:846 CONSPIRACY (1)	CBOP 60 months concurrent with state sentence; with special conditions; SPA $150.00; deft held in custody (1)
18:924(c)(1) & 18:924(a)(2) POSSESSION OF A	CBOP 60 months concurrent with state sentence;

FIREARM IN USE OF A DRUG TRAFFICKING CRIME (3)	with special conditions; A SPA $150.00; deft held in custody (3)
21:841(a)(1) & 21:841(b)(1)(D) POSSESSION WITH INTENT TO DISTRIBUTE LESS THAN 50 KILOGRAMS OF MARIJUANA; 18:2 AIDING AND ABETTING (6)	CBOP 60 months concurrent with state sentence; with special conditions; SPA $150.00; deft held in custody (6)

Offense Level (opening): 4

Termnated Counts:

NONE

Complaints:

NONE

Case Assigned to: Judge John E. Conway

MARIO PEREZ (3) defendant [term 10/06/93]	Roberto Albertorio, Esq. [term 10/06/93] [COR LD NTC cja] PO Box 90351 Albuquerque, NM 87199-0351 (505) 768-3917

Pending Counts:	Disposition
21:846 CONSPIRACY (1)	CBOP 87 months concurrent with each count and State sentence; with special conditions; SPA $150.00; deft held in custody (1)

18:924(c)(1) & 18:924(a)(2) POSSESSION OF A FIREARM IN USE OF A DRUG TRAFFICKING CRIME (2)	CBOP 87 months concurrent with each count and State sentence; with special conditions; SPA $150.00; deft held in custody (2)
21:841(a)(1) & 21:841(b)(1)(D) POSSESSION WITH INTENT TO DISTRIBUTE LESS THAN 50 KILOGRAMS OF MARIJUANA; 18:2 AIDING AND ABETTING (6)	CBOP 87 months concurrent with each count and State sentence; with special conditions; SPA $150.00; deft held in custody (6)

Offense Level (opening): 4

Terminated Counts:

NONE

Complaints:

NONE

Case Assigned to: Judge John E. Conway

MIGUEL GONZALES (4) defendant [term 09/29/93]	Edward O. Bustamante, Esq. [term 09/29/93] [COR LD NTC cja] Padilla & Associates 1412 Lomas Blvd, NW Albuquerque, NM 87104 (505) 842-0392

Pending Counts:	Disposition
21:846 CONSPIRACY (1)	CBOP 60 months with 3 years supervised release and special conditions; deportation proceedings to be in progress prior to defts release; SPA $50.00; deft held in custody; three level reduction denied (1)
18:924(c)(1) & 18:924(a)(2) POSSESSION OF A FIREARM IN USE OF A DRUG TRAFFICKING CRIME (5)	CBOP 60 months with 3 years supervised release and special conditions; deportation proceedings to be in progress prior to defts release; SPA $50.00; deft held in custody; three level reduction denied (5)
21:841(a)(1) & 21:841(b)(1)(D) POSSESSION WITH INTENT TO DISTRIBUTE LESS THAN 50 KILOGRAMS OF MARIJUANA; 18:2 AIDING AND ABETTING (6)	CBOP 60 months with 3 years supervised release and special conditions; deportation proceedings to be in progress prior to defts release; SPA $50.00; deft held in custody; three level reduction denied (6)

Offense Level (opening): 4

Terminated Counts:

NONE

Complaints:

NONE

U. S. Attorneys:

Thomas L. English, Esq.
[COR LD NTC]
US Attorney's Office
District of New Mexico
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(505) 766-3341

RELEVANT DOCKET ENTRIES

5/8/92	1	INDICTMENT by USA Thomas L. English. Counts filed against Luis Leon (1) count(s) 1, 4, 6, Orlenis Hernandez-Diaz (2) count(s) 1, 3, 6, Mario Perez (3) count(s) 1, 2, 6, Miguel Gonzales (4) count(s) 1, 5, 6 (bl) [Entry date 08/17/92]
5/8/92	—	ARREST Warrant issued for Luis Leon (bl) [Entry date 08/17/92]
5/8/92	—	ARREST Warrant issued for Orlenis Hernandez-Diaz (bl) [Entry date 08/17/92]
5/8/92	—	ARREST Warrant issued for Mario Perez (bl) [Entry date 08/17/92]
5/8/92	—	ARREST Warrant issued for Miguel Gonzales (bl) [Entry date 08/17/92]
9/28/92	2	MOTION for Writ of Habeas Corpus Ad Prosequendum by USA as to Luis Leon (jg) [entry date 09/30/92]
9/28/92	4	MOTION for Writ of Habeas Corpus Ad Prosequendum by USA as to Orlenis Hernandez-Diaz (jg) [Entry date 09/30/92]
9/28/92	6	MOTION for Writ of Habeas Corpus Ad Prosequendum by USA as to Mario Perez (jg) [Entry date 09/30/92]
9/28/92	8	MOTION for Writ of Habeas Corpus Ad Prosequendum by USA as to Miguel Gonzales (jg) [Entry date 09/30/92]

9/29/92	3	ORDER by Judge John E. Conway granting motion for Writ of Habeas Corpus Ad Prosequendum by USA as to Luis Leon for arraignment on 10/29/92 at 9:00 A.M. [2-1] (cc: all counsel) (jg) [Entry date 09/30/92]
9/29/92	5	ORDER by Judge John E. Conway granting motion for Writ of Habeas Corpus Ad Prosequendum by USA as to Orlenis Hernandez-Diaz [4-1] (cc: all counsel) (jg) [Entry date 09/30/92]
9/29/92	7	ORDER by Judge John E. Conway granting motion for Writ of Habeas Corpus Ad Prosequendum by USA as to Mario Perez [6-1] (cc: all counsel) (jg) [Entry date 09/30/92]
9/29/92	9	ORDER by Judge John E. Conway granting motion for Writ of Habeas Corpus Ad Prosequendum by USA as to Miguel Gonzales [8-1] (cc: all counsel) (jg) [Entry date 09/30/92]
9/30/92	—	WRIT of Habeas Corpus Ad Prosequendum issued for defendant, Luis Leon for arraignment on 10/29/92 at 9:00 A.M. (jg) [Entry date 09/30/92] [Edit date 09/30/92]
9/30/92	—	WRIT of Habeas Corpus Ad Prosequendum issued for defendant Hernandez-Diaz for arraignment on 10/29/92 at 9:00 A.M. (jg) [Entry date 09/30/92] [Edit date 09/30/92]

9/30/92	—	WRIT of Habeas Corpus Ad Prosequendum issued for defendant Mario Perez for arraignment on 10/29/92 at 9:00 A.M. (jg) [Entry date 09/30/92] [Edit date 09/30/92]
9/30/92	—	WRIT Habeas Corpus Ad Proseguendum issued for defendant Miguel Gonzales for arraignment on 10/29/92 (jg) [Entry date 09/30/92]
10/27/92	10	CJA Form 20 Copy 4 (Appointment of Counsel) Angela Arellanes for defendant Qrlenis Hernandez-Diaz (jg) [Entry date 10/29/92] [Edit date 10/29/92]
10/27/92	11	CJA Form 20 Copy 4 (Appointment of Counsel) Alonzo J. Padilla for Luis Leon (jg) [Entry date 10/29/92]
10/27/92	12	CJA Form 20 Copy 4 (Appointment of Counsel) Edward O. Bustamante for defendant Miguel Gonzales (jg) [Entry date 10/29/92]
10/27/92	13	CJA Form 20 Copy 4 (Appointment of Counsel) Roberto Albertorio for defendant Mario Perez (jg) [Entry date 10/29/92]
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		PRETER REQUIRED**, #: 1045B#3 (jg) [Entry date 10/29/92]
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10/29/92	17	ORDER that counsel meet and confer and jointly prepare OHR by Magistrate William Deaton (cc: all counsel) (jg) [Entry date 10/29/92]
10/29/92	18	ORDER Re: Discovery by Magistrate William Deaton (cc: all counsel) (jg) [Entry date 10/29/92]
10/29/92	—	DEFENDANT Luis Leon arrested (jg) [Entry date 10/29/92]
10/29/92	19	MOTION for writ of HCAP by USA as to Luis Leon (jg) [Entry date 10/30/92]

11/3/92	20	ORDER by Judge John E. Conway granting motion for writ of HCAP by USA as to Luis Leon to appear for arraignment on 11/19/92 at 9:30 [19-1] (cc: all counsel) (pg) [Entry date 11/03/92]
11/3/92	—	WRIT of Habeas Corpus Ad Prosequendum as to Luis Leon to appear for arraignment on 11/19/92 at 9:30 am issued in triplicate to USM (pg) [Entry date 11/03/92]
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11/18/92	22	MOTION to extend time in which to file omnibus and other motions as deemed relevant to this case by defendant Mario Perez (pg) [Entry date 11/19/92]
11/19/92	23	CLERK'S MINUTES: before Magistrate William Deaton dft Luis Leon arraigned; not guilty plea entered as to Counts I and IV of Indictment; Attorney Alonzo Padilla present for deft Leon; Motions and OHR due by 12/9/92; Trial to be set at a later time; No Bond; deft in State Custody Tape #: 1050 B#2 (pg) [Entry date 11/20/92]
11/19/92	24	ORDER sua sponte; counsel to meet and prepare OHR by Magistrate William Deaton (cc: all counsel) (pg) [Entry date 11/20/92]

11/19/92	25	ORDER sua sponte re: Filing of Discovery Documents by Magistrate William Deaton (cc: all counsel) (pg) [Entry date 11/20/92]
11/19/92	26	MOTION to extend time to file motions until 11/25/92 by defendant Orlenis Hernandez-Diaz (pg) [Entry date 11/20/92]
11/20/92	27	ORDER granting motion to extend time in which to file omnibus and other motions as deemed relevant to this case defendant Mario Perez et al., [22-1] pre-trial motions due 12/9/92 (cc: all counsel) (pg) [Entry date 11/20/92]
11/23/92	28	ORDER by Judge John E. Conway granting motion to extend time to file motions until 11/25/92 by defendant Orlenis Hernandez-Diaz [26-1] (cc: all counsel) (bl) [Entry date 11/23/92]
11/25/92	29	OMNIBUS Hearing Report as to deft Miguel Gonzales by Judge John E. Conway (cc: all counsel) (pq) [Entry date 11/25/92]
11/25/92	30	MOTION by defendant Orlenis Hernandez-Diaz to dismiss indictment, or in the alternative to compel enforcement of the petite policy (pg) [Entry date 12/01/92]
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12/11/92	39	OMNIBUS Hearing Report as to Mario Perez by Judge John E. Conway (cc: all counsel) (pg) [Entry date 12/12/92]
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12/18/92	42	ORDER by Judge John E. Conway denying motion by defendant Mario Perez to dismiss indictment on grounds of double jeopardy particularly counts I, II and VI [34-1] (cc: all counsel) (ls) [Entry date 12/18/92]
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12/30/92	45	MOTION for order for Writ of Habeas Corpus Ad Prosequendum by USA as to Luis Leon (pr) [Entry date 12/30/92]
12/30/92	46	MOTION for order for Writ of Habeas Corpus Ad Prosequendum by USA as to Orlenis Hernandez-Diaz (pr) [Entry date 12/30/92]

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1/5/93	—	WRIT of HCAP issued as to Luis Leon (ddc) [Entry date 01/05/93]

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1/20/93	54	ENHANCEMENT INFORMATION charging prior convictions by USA as to Mario Perez (bl) [Entry date 01/21/93]
1/28/93	55	NOTICE of jury selection/trial on 3/8/93 at 9:00 before Judge Conway (cc: all counsel) (pg) [Entry date 02/02/93]
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2/19/93	63	ORDER by Judge John E. Conway granting motion for order for issuance of Writ of Habeas Corpus Ad Prosequendum as to Luis Leon for trial on 3/8/93 at 9:00 before Judge Conway [58-1] (cc: all counsel) (pg) [Entry date 02/19/93]

2/19/93	64	ORDER by Judge John E. Conway granting motion for order for issuance of Writ of Habeas Corpus Ad Prosequendum as to Mario Perez; for trial on 3/8/93 at 9:00 before Judge Conway [59-1] (cc: all counsel) (pg) [Entry date 02/19/93]
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6/8/93	—	WRIT of Habeas Corpus Ad Prosequendum issued as to deft Orlenis Hernandez-Diaz (pg) [Entry date 06/09/93]
6/8/93	91	MOTION that the Court order the Clerk to issue a Writ of Habeas Corpus Ad Prosequendum by USA as to Mario Perez (pg) [Entry date 06/09/93]
6/8/93	92	ORDER by Chief Judge Juan G. Burciaga by Judge Conway granting motion that the Court order the Clerk to issue a Writ of Habeas Corpus Ad Prosequendum as to Mario Perez [91-1] (cc: all counsel) (pg) [Entry date 06/09/93] [Edit date 06/09/93]
6/8/93	93	MOTION to continue trial set for 6/14/93 by defendant Mario Perez (pg) [Entry date 06/09/93]

6/8/93	94	MOTION in limine that the Court determine, whether certain evidence the government intends to introduce should be excluded by defendant Orlenis Hernandez-Diaz (pg) [Entry date 06/09/93]
6/9/93	—	WRIT of Habeas Corpus Ad Prosequendum issued as to deft Mario Perez (pg) [Entry date 06/09/93]
6/9/93	95	REQUESTED JURY Instructions by defendant Mario Perez (pg) [Entry date 06/09/93]
6/11/93	96	ORDER by Judge John E. Conway granting motion to continue trial set for 6/14/93 by defendant Mario Perez [93-1] trial set for 6/17/93 at 8:30 (cc: all counsel) (pg) [Entry date 06/11/93]
6/11/93	97	RESPONSE by plaintiff USA to motion in limine that the Court determine, whether certain evidence the government intends to introduce should be excluded by defendant Orlenis Hernandez-Diaz [94-1] (pg) [Entry date 06/14/93]
6/11/93	98	ENHANCEMENT INFORMATION charging prior convictions by USA as to Mario Perez (pg) [Entry date 06/14/93]
6/14/93	99	CLERK'S MINUTES: before Judge John E. Conway; June 14/93 trial began, preliminary instructions given to the jury panel , voir dire begins, Recess; June 15, 1993; Court in Session; Recess June 17, 1993; Court in session; Crt

		denies defts motion for mistrial; recess; June 18, 1993; Court in session; Jury verdict reached finding Luis Leon guilty (1) count(s) 1, 4, 6, finding Orlenis Hernandez-Diaz guilty (2) count(s) 3, 6, finding Mario Perez guilty (3) 1, 2, 6, finding Miguel Gonzales guilty (4) count(s) 1, 5, 6 exhibit and witness list attached C. Chapman (pg) [Entry date 06/22/93] [Edit date 06/28/93]
6/17/93	100	REQUESTED JURY Instructions by defendant Luis Leon (pg) [Entry date 06/22/93]
6/18/93	101	COURTS Instructions to the jury (pg) [Entry date 06/22/93]
6/18/93	102	NOTE FROM THE JURY re: verdict (pg) [Entry date 06/22/93]
6/18/93	103	VERDICT: guilty as to Counts I, II, VI for deft Orlenis Hernandez-Diaz (pg) [Entry date 06/22/93] [Edit date 06/28/93]
6/18/93	104	VERDICT: guilty as to Counts I, II, VI for deft Mario Perez (pg) [Entry date 06/22/93]
6/18/93	105	VERDICT: guilty as to Counts I, V and VI for deft Miguel Gonzales (pg) [Entry date 06/22/93]
6/18/93	106	VERDICT: guilty as to Counts I, IV, VI for deft Luis Leon (pg) [Entry date 06/22/93]

6/24/93	107	NOTICE of sentencing hearing on 9/8/93 at 1:15 pm before Judge Conway in Albuquerque, NM (CLERK:dw) (cc: all counsel) (pg) [Entry date 06/24/93]
8/2/93	108	MOTION by defendant Luis Leon to withdraw his attorney Alonzo Padilla (pg) [Entry date 08/03/93]
8/18/93	—	TRANSCRIPT of Proceedings of day three of jury trial held on 6/17/93 held before Judge Conway (pg) [Entry date 08/19/93]
8/18/93	109	ORDER by Judge John E. Conway denying Luis Leon's motion to withdraw his attorney Alonzo Padilla [108-1] (cc: all counsel) (pg) [Entry date 08/19/93]
8/30/93	110	OBJECTIONS to Presentence report and sentencing memorandum by defendant Miguel Gonzales (pg) [Entry date 08/31/93]
9/3/93	111	OBJECTIONS to pre-sentence report by defendant Luis Leon (pg) [Entry date 09/03/93]
9/3/93	112	OBJECTIONS to presentence report and sentencing memorandum by defendant Orlenis Hernandez-Diaz (pg) [Entry date 09/07/93]
9/7/93	113	MOTION to vacate the sentencing until after the deft has been sentenced by the Second Judicial District Court by USA as to Luis Leon (pg) [Entry date 09/08/93]

9/8/93	114	SENTENCING memorandum re Orlenis Hernandez-Diaz, Mario Perez, Miguel Gonzales by USA (pg) [Entry date 09/08/93]
9/8/93	115	OBJECTIONS by defendant Mario Perez to sentencing memorandum [114-1] (pg) [Entry date 09/08/93]
9/8/93	116	ORDER by Judge John E. Conway granting motion to vacate the sentencing until after the deft has been sentenced by the Second Judicial District Court [113-1] sentencing hearing set for 9/8/93 as to deft Leon is hereby vacated (cc: all counsel) (pg) [Entry date 09/08/93]
9/8/93	117	NOTICE of sentencing hearing set for 9/22/93 at 1:15 pm before Judge Conway, in Albuquerque, NM as to all defts (CLERK:lj)(cc: all counsel) (pg) [Entry date 09/09/93]
9/20/93	118	MOTION to vacate sentence set for 9/22/93 to 10/6/93 by deft Orlenis Hernandez-Diaz (pg) [Entry date 09/20/93]
9/21/93	119	ORDER by Judge John E. Conway granting motion to vacate sentence set for 9/22/93 [18-1] sentencing hearing reset for 10/6/93 at 1:15 pm (cc: all counsel) (pg) [Entry date 09/21/93]
9/23/93	120	RESPONSE by defendant Miguel Gonzales to sentencing memorandum [114-1] (pg) [Entry date 09/24/93]

9/29793	121	CLERK'S MINUTES: before Judge John E. Conway sentencing Miguel Gonzales (4) count(s) 1, 5, 6. CBOP 60 months 3 years supervised release and special conditions; deportation proceedings to be in progress prior to defts release; SPA $50.00; deft held in custody; three level reduction denied, terminating party(s) C/R: C. Chapman (pg) [Entry date 09/30/93]
9/30/93	122	MOTION for order to issue a writ of habeas corpus ad prosequendum for hearing on 10/6/93 before Judge Conway by USA as to Luis Leon (pg) [Entry date 10/04/93]
10/1/93	123	ORDER by Judge John E. Conway granting motion for order to issue a writ of habeas corpus ad prosequendum as to deft Leon for a hearing on 10/6/93 before Judge Conway [122-1] (cc: all counsel) (pg) [Entry date 10/04/93]
10/5/93	124	REPLY by defendant Orlenis Hernandez-Diaz to Government's sentencing memorandum [114-1] (pg) [Entry date 10/06/93]
10/6/93	125	CLERK'S MINUTES: before Judge John E. Conway sentencing Orlenis Hernandez-Diaz (2) count(s) 1, 3, 6 of the Indictment. CBOP 60 months concurrent with state sentence; with special conditions; SPA $150.00; deft held in custody C/R: F. Donica (pg) [Entry date 10/07/93]

10/6/93 126 CLERK'S MINUTES: before Judge John E. Conway sentencing Mario Perez (3) count(s) 1, 2, 6 of Indictment. CBOP 87 months concurrent with each count and State sentence; with special conditions; SPA $150.00; deft held in custody, party(s) Mario Perez C/R: F. Donica (pg) [Entry date 10/07/93]

10/6/93 127 CLERK'S MINUTES: before Judge John E. Conway sentencing Luis Leon (1) count(s) 1, 4, 6 of the Indictment. CBOP 60 months with State sentence; 3 years supervised release; with special conditions; SPA $150.00; deft held in custody, case terminated, terminate party(s) Luis Leon C/R: F. Donica (pg) [Entry date 10/07/93]

10/12/93 128 NOTICE of return executed Writ by taking into custody from Central NM Correctional Center Miguel Gonzales to USM on 10/28/93 (pg) [Entry date 10/13/93]

10/14/93 129 JUDGMENT by Judge John E. Conway as to deft Miguel Gonzales (distribution as required) (pg) [Entry date 10/14/93]

10/18/93 137 CJA 21 (Expert Services) payable to Dania Marquez in amount of $300 re: Luis Leon (jm) [Entry date 10/29/93]

10/19/93 130 JUDGMENT by Judge John E. Conway as to deft Orlenis Hernandez-Diaz (distribution as required) (pg) [Entry date 10/20/93]

10/19/93 131 JUDGMENT by Judge John E. Conway as to deft Luis Leon (distribution as required) (pg) [Entry date 10/20/93]

10/19/93 132 JUDGMENT by Judge John E. Conway as to deft Mario Perez (distribution as required) (pg) [Entry date 10/20/93]

10/25/93 133 NOTICE of Appeal to Circuit Court by defendant Orlenis Hernandez-Diaz [130-1]; Fees waived—Distribution as required. (pg) [Entry date 10/26/93]

10/26/93 134 AMENDED JUDGMENT in a Criminal Case by Judge John E. Conway as to Miguel Gonzales; deft found guilty as to Count I and Count VI of indictment; deft committed to custody of CBOP for 60 months each count, to run concurrently with State of New Mexico sentence, for which deft is currently confined; as to Count V, deft found guilty and committed to custody of CBOP for 60 months, to run consecutively to sentence imposed on Counts I and VI and consecutively with State of NM sentence, for which deft is currently confined; supervised release for a period of 3 years as to each Count I, V and VI, to run concurrently; SPA $50 as to each count, for a total of $150; no fine imposed; voluntary surrender not granted (distribution as required) (mls) [Entry date 10/27/93]

10/27/93 135 NOTICE OF APPEAL by defendant Luis Leon from Dist. Court judment filed 10/20/93 [131-1]; Fees not necessary—Distribution as required. (cc: all counsel) (pg) [Entry date 10/28/93]

10/28/93 136 NOTICE of Appeal to Circuit Court by defendant Miguel Gonzales to the Amended Judgment filed 10/26/93 [134-1] ; Fees not necessary—Distribution as required. (pg) [Entry date 10/28/93]

10/29/93 138 NOTICE of Appeal to Circuit Court by defendant Mario Perez from the Judgment filed 10/19/93 [132-1] ; Fees not necessary—Distribution as required. (pg) [Entry date 11/01/93]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, *Plaintiff*,

v.

LUIS LEON, ORLENIS HERNANDEZ-DIAZ, MARIO PEREZ, MIGUEL GONZALES, *Defendants*.

INDICTMENT

CRIMINAL NO. 92-236 21 U.S.C. § 846: Conspiracy; 18 U.S.C. § 924(c): Possession of a Firearm in Use of a Drug Trafficking Crime; 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(D): Possession with Intent to Distribute Less than 50 Kilograms of Marijuana; 18 U.S.C. § 2: Aiding and Abetting.

The Grand Jury charges:

COUNT I

From on or about the 22nd day of April, 1991, to on or about the 23rd day of April, 1991, in Bernalillo County, in the State and District of New Mexico, and elsewhere, the defendants, LUIS LEON, ORLENIS HERNANDEZ-DIAZ, MARIO PEREZ, and MIGUEL GONZALES, did unlawfully, knowingly and intentionally combine, conspire, confederate, and agree together and with one another and with other persons whose names are known and unknown to the grand jury to commit offenses against the United States, to wit: violation of 21

U.S.C. § 841(a)(1) and § 841(b)(1)(D), that is possession with intent to distribute less than 50 kilograms of marijuana, a schedule I controlled substance.

In violation of 21 U.S.C. § 846 and 18 U.S.C. § 2.

COUNT II

On or about the 22nd day of April, 1991, in Bernalillo County, in the State and District of New Mexico, the defendant, MARIO PEREZ, knowingly used and carried a firearm, to wit: a Browning, High Power, 9mm pistol, serial number 245RR64607, during and in relation to a drug trafficking crime for which defendant may be prosecuted in a court of the United States, to wit: conspiracy to possess with intent to distribute less than 50 kilograms of Marijuana, contrary to 21 U.S.C. § 846, 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D).

In violation of 18 U.S.C. § 924(c)(1), 18 U.S.C. § 924(a)(2) and 18 U.S.C. § 2.

COUNT III

On or about the 22nd day of April, 1991, in Bernalillo County, in the State and District of New Mexico, the defendant, ORLENIS HERNANDEZ-DIAZ, knowingly used and carried a firearm, to wit: a Llama, 9mm caliber pistol, serial number 946130, during and in relation to a drug trafficking crime for which defendant may be prosecuted in a court of the United States, to wit: conspiracy to possess with intent to distribute less than 50 kilograms of marijuana, contrary to 21 U.S.C. § 846, 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D).

In violation of 18 U.S.C. § 924(c)(1), 18 U.S.C. § 924(a)(2) and 18 U.S.C.§ 2.

COUNT IV

On or about the 22nd day of April, 1991, in Bernalillo County, in the State and District of New Mexico, the defendant, LUIS LEON, knowingly used and carried a firearm, to wit: a Raven, model MP-25, .25ACP caliber pistol, serial number 1730142, during and in relation to a drug trafficking crime for which defendant may be prosecuted in a court of the United States, to wit: conspiracy to possess with intent to distribute less than 50 kilograms of marijuana, contrary to 21 U.S.C. § 846 and 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D).

In violation of 18 U.S.C. § 924(c)(1), 18 U.S.C. § 924(a)(2) and 18 U.S.C. § 2.

COUNT V

On or about the 22nd day of April, 1991, in Bernalillo County, in the State and District of New Mexico, the defendant, MIGUEL GONZALES, knowingly used and carried a firearm, to wit: a Llama, 9mm caliber pistol, serial number 946130, during and in relation to a drug trafficking crime for which defendant may be prosecuted in a court of the United States, to wit: conspiracy to possess with intent to distribute less than 50 kilograms of marijuana, contrary to 21 U.S.C.§ 846 and 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D).

In violation of 18 U.S.C. § 924(c)(1), 18 U.S.C. § 924(a)(2) and 18 U.S.C. § 2.

COUNT VI

On or about the 23th day of April, 1991, in Bernalillo County, in the State and District of New Mexico, the defendants, LUIS LEON, ORLENIS HERNANDEZ-

DIAZ, MARIO PEREZ, and MIGUEL GONZALES, did unlawfully, knowingly and intentionally possess with intent to distribute less than 50 kilograms of Marijuana, a Schedule I controlled substance.

In violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(D).

A TRUE BILL:

FOREPERSON OF THE GRAND JURY

DON J. SVET
United States Attorney

IN THE UNITED STATES FEDERAL COURT
FOR THE DISTRICT OF NEW MEXICO

No. CR92-236-JC

UNITED STATES OF AMERICA, *Plaintiff,*

v.

MIGUEL GONZALES, ET AL., *Defendant.*

MOTION TO DISMISS INDICTMENT OR IN THE ALTERNATIVE, TO COMPEL ENFORCEMENT OF THE PETITE POLICY

Miguel Gonzales through counsel Ed Bustamante, and pursuant to the Fifth amendment of the United States Constitution and Deparment of Justice Manual 9-2.142, the *Petite* policy, moves this Court dismiss the indictment in this case or, compel the government to implement the *Petite* policy and dismiss the indictment in this case. As grounds for his motion, defendant states:

1. Defendant is charged in federal court with conspiracy to possess less than fifty (50) kilograms of marijuana, possessing a gun while committing a drug offense, and possession of less than fifty (50) kilograms of marijuana. Each offense grows out of a single episode of alleged criminal conduct allegedly occurring April 22nd and 23rd 1991. The indictment was filed May 8, 1992.

2. On February 11, 1992, a jury in state court in the Second Judicial District, Bernalillo County, convicted Miguel Gonzales of Armed Robbery of Marijuana, with a

one-year firearm enhancement, Conspiracy to Commit Armed Robbery, with a one year firearm enhancement, and Conspiracy to Possess Marijuana (Eight ounces or more). The above convictions involved the identical firearms and the identical episode of alleged criminal conduct charged in this federal indictment. The State conviction occurred three (3) months before the federal grand jury indicted in this cause. The State court sentenced defendant to nineteen and one half years, with six and one half years suspended.

3. The government has not received authorization from the Attorney General pursuant to Department of Justice Manual 9-2.142 to initiate or continue the federal prosecution of defendant. The Department of Justice states, the policy "is intended to regulate prosecutorial discretion in order to promote efficient utilization of the Department's resources and to protect persons charged with criminal conduct from unfairness associated with multiple prosecutions and multiple unfairness for substantially the same act or acts." *See* DOJ Manual 9-2.142. *Rinaldi v. United States*, 434 U.S. 22, 27 (1977); *Petite v. United States*, 361 U.S. 529 (1960).

In support of this motion, defendant cites the following argument and authority:

In a *per curiam* opinion in *Petite v. U.S.*, 361 U.S. 529 (1960), the Supreme Court, without reaching the merits on the question of Double Jeopardy, remanded the case with directions the district court follow the Solictor General's motion to vacate the indictment against the defendant on the grounds he was already convicted of the same offense in state court as charged in federal court. The Solicitor General had moved to dismiss the charge based on government policy, "dictated by considerations both of fairness to defendants and to efficient

and orderly law enforcement" to forego multiple prosecutions arising out of the same offense for which a defendant had been convicted in state court. *Id.* at 530.

Although the Justice Department's "*Petite*" policy is self-policing, a defendant can raise the claim of a violation of the policy in federal court. *See, Rinaldi v. U.S.*, 434 U.S. 22, 23 (1977). In its *per curiam* opinion in *Rinaldi*, the Supreme Court noted that the *Petite* policy was generated as a response to the Court's concern about the legitimacy of dual state and federal prosecutions for the same offense. It noted that "although not constitutionally mandated, this Executive policy serves to protect interests which, but for the 'dual sovereignty' principle inherent in our federal system, would be embraced by the Double Jeopardy Clause." *Id.* at 29.

The policy, "efficient utilization of Justice Department resources" is not served by successive prosecutions of a defendant already convicted and sentenced to prison on state charges for the identical conduct in the federal indictment. A total sentence of nineteen and one half (19 1/2) years satisfies the ends of justice for the criminal conduct whether the result of state of federal prosecution simultaneously, it is unfair to subject defendant to multiple prosecutions "for substantially the same act." DOJ Manual 9-2.142.

The *Petite*, policy requires the government receive prior authorization before pursuing multiple prosecutions for the same conduct already punished in state court. The government has violated the spirit and letter of DOJ Manual 9-2.142. Defendant requests this Court dismiss the indictment or compel the government to implement the *Petite*, policy and dismiss the indictment.

In compliance with local rules, counsel states that the government opposes this motion.

Respectfully submitted,

EDWARD O. BUSTAMANTE
1412 LOMAS BLVD., NW
ALBUQUERQUE, NM 87104
(505) 842-0392

This certifies a copy of this Motion was sent to the U.S. Attorney this 18th day of November 1992.

EDWARD O. BUSTAMANTE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. CR92-236-JC

UNITED STATES OF AMERICA, *Plaintiff*,

v.

ORLENIS HERNANDEZ-DIAZ, *Defendant*.

MOTION TO DISMISS INDICTMENT OR IN THE ALTERNATIVE, TO COMPEL ENFORCEMENT OF THE PETITE POLICY

COMES NOW the Defendant and pursuant to the Fifth Amendment of the United States Constitution and Department of Justice Manual 9-2.142, moves this Court to dismiss the indictment in this case, or compel the Government implement the *Petite* policy, and as grounds thereof states as follows:

1. The Defendant was indicted on May 8, 1992, for conspiracy to possess less than 50 kilograms of marijuana, possession with intent to distribute less than 50 kilograms of marijuana, and possession of a firearm during or in relation to a drug trafficking crime. The alleged facts on which the offenses are based occurred April 22, and April 23, 1991.

2. Defendant Hernandez-Diaz was convicted on February 11, 1992, pursuant to a jury verdict of guilty in State Court in the Second Judicial District Court, Bernalillo County for the offenses of Armed Robbery, with a 1 year firearm enhancement, Attempt to Commit a Felony, firearm enhancement, Conspiracy to Commit

Armed Robbery, firearm enhancement, False Imprisonment, firearm enhancement, and Conspiracy to Commit Possession of Marijuana over eight ounces. The Defendant received a sentence of 22 years of which 7.5 years were suspended which left a balance of 14.5 years to be served. The convictions in State Court involved the identical set of facts, firearms and marijuana which served the basis for the indictment in Federal Court.

3. The Government has not complied with its own policies and procedures pursuant to DOJ manual 9-2.142, commonly referred as the *Petite* policy. The section states:

No Federal case should be tried when there has been a State prosecution for substantially the same act or acts without a recommendation having been made to the Assistant Attorney General demonstrating compelling federal interests for such prosecution. No such recommendation may be approved by Assistant Attorney General without having it first brought to the attention of the Attorney General.

4. The overriding purpose of the *Petite* policy is to protect the individual from any unfairness associated with needless multiple prosecution. *Rinaldi vs. United States*, 434 U.S. 22, (1977). A secondary purpose of the policy is to preserve judicial and prosecutorial resources expended in needless prosecution. Interests protected by the Double Jeopardy Clause, but for the "dual sovereignty" principle, are recognized. There is a great potential for abuse in duplicate prosecutions. However, the Government may elect to proceed when necessary to advance to compelling interests in federal law enforcement. *Supra.*

5. The Defendant received a 22 year sentence. No societal interest would be vindicated by punishing further a Defendant who has already been convicted and received a substantial sentence in State Court based on the identical conduct which gave rise to the offenses indicted in Federal Court.

6. The Government to date has not received authorization from the Attorney General to pursue an indictment in Federal Court for the same conduct already punished in State Court. The Government has violated the spirt and letter of DOJ Manual 9-2.142.

7. Assistant United States Attorney, Tom English opposes this Motion.

WHEREFORE the Defendant prays that the Court dismiss the indictment or compel the Government to enforce the *Petite* policy.

Respectfully submitted,

/s/ ANGELA ARELLANES

Angela Arellanes
Attorney for Defendant
320 Gold SW-Suite 916
Albuquerque, NM 87102
(505) 247-2417

I hereby certify that a
true copy of the foregoing
pleading was mailed to counsel
of record this 25 day of
November, 1992.

Angela Arellanes

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. CR92-236 JC

UNITED STATES OF AMERICA, *Plaintiff*,

v.

LUIS LEON, ORLENIS HERNANDEZ-DIAZ, MARIO PEREZ, MIGUEL GONZALES, *Defendants*.

MOTION TO DISMISS ON GROUNDS OF DOUBLE JEOPARDY

Defendant, MARIO PEREZ, through counsel, ROBERTO ALBERTORIO, moves this Court to Dismiss the Indictment above referenced particularly Counts I, II, and VI. As grounds for this Motion, Defendant respectfully submits as follows:

FACTS

An indictment was filed with the United States District Court for the District of New Mexico on May 8, 1992 charging this Defendant, et al., with violation of 21 U.S.C. 846: Conspiracy; 18 U.S.C. 924(c); Possession of a Firearm in Use of a Drug Trafficking Crime; 21 U.S.C. 841(a)(l) and 21 U.S.C. 841(b)(l)(D): Possession with Intent to Distribute Less than 50 Kilograms of Marijuana; 18 U.S.C. 2: Aiding and Abetting. The Defendant was arraigned on Thursday, October 29, 1992 at 9:30 a.m. before the Hon: Magistrate Deaton.

The Defendant, MARIO PEREZ was subject to New Mexico State prosecution in the Second Judicial District

Court, County of Bernalillo No CR-91-0776, pursuant to an Indictment wherein he was found guilty after trial and sentenced to the following state offenses: Armed Robbery (Firearm Enhancement), a felony offense occurring on or about April 23, 1991; Armed Robbery (Firearm Enhancement) a felony offense occurring on or about April 23, 1991 as contained in Count II, of the state indictment; Armed Robbery of Marijuana (Firearm Enhancement) as contained in Count 3 of the state indictment; Conspiracy to Commit Armed Robbery (Firearm Enhancement) a felony offense occurring on or about April 23, 1991, as contained in Count IV, of the state indictment; False Imprisonment (Firearm Enhancement) a felony offense occurring on or about April 23, 1991, as contained in Count V, of the state indictment; Conspiracy to Commit Possession of Marijuana (eight ounces or more) a felony offense occurring on or about April 23, 1991, as contained in Count VI, of the state indictment as amended in trial, and Eluding an Officer, a misdemeanor offense occurring on or about April 23, 1991, as contained in Count 7 of the state indictment as amended at trial.

The Defendant was found and adjudged guilty and convicted and sentenced for the term of nine (9) years as to *each* Armed Robbery; three (3) years as to Attempt to Commit a Felony to wit: Armed Robbery of Marijuana; three (3) years as to Conspiracy to Commit Armed Robbery; one and one-half (1 1/2) years as to Conspiracy to Commit Possession of Marijuana; and one and one-half (1 1/2) years as to False Imprisonment; and three-hundred sixty-four (364) days as to Eluding an Officer. All sentences to run *consecutive* to one another. In addition, all of the offenses, excluding Conspiracy to Commit Possession of Marijuana and Eluding an Officer, were *each* enhanced by 1 year pursuant to Section 31-18-16 NMSA, 1978 for a total sentence of (32) years and three

hundred and sixty-four days of which (15) years and three hundred and sixty-four days were suspended for an actual sentence of seventeen (17) years. The Defendant was also ordered to be placed on supervised probation for five (5) years following release from custody.

The matter before the Federal District Court pursuant to this Indictment is based on the same factual occurrences as above described. Specifically the Defendant is charged with the federal offenses to have occurred on or about the 22 of April 1991, to on or about the 23rd day of April, 1991.

There is no evidence that the Defendant engaged in any criminal activity beyond the day described in both the state and federal indictments.

ANALYSIS

The Double Jeopardy Clause of the Fifth Amendment guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The Clause provides three separate protections for criminal defendant: against reprosecution for the same offense after an acquittal; against prosecution for the same offense after a conviction; and against multiple punishments for the same offense. In Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 306-07 (1984)(dictum), the Supreme Court articulated several policy justifications for the protections conferred by the Double Jeopardy Clause. First, the prohibition against reprosecution after acquittal or conviction "ensures that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction or an impermissibly enhanced sentence." Ohio v. Johnson, 467 U.S. 493, 498-99 (1984)(dictum). Second, the prohibition against retrial after conviction prevents a defendant from being subject to the multiple punishments for the same offense. Lydon, 466 U.S. at 307. Third, the protection against cumulative punishments "is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature." Johnson, 467 U.S. at 499 (dictum).

The Federal Indictment is a reprosecution for the offenses for which the Defendant has already been tried convicted and sentenced. The Government's additional prosecution of these offenses will serve only to enhance sentences to which the Defendant is already in custody. It is anticipated that if this matter goes to trial, the Government will call the same witnesses to testify to the identical facts established in the State prosecution. The defendant submits that the file through discovery contains no additional information or evidence which were not already contained in the original prosecution.

The Double Jeopardy challenge is immediately appealable because Double Jeopardy Clause protects against even "risk" of conviction. Abney v. U.S., 431 U.S. 651, 660-62 (1977). Double Jeopardy Clause generally requires that all charges against defendant growing out of a "single criminal act, occurrence, transaction, or episode be prosecuted in one proceeding" (quoting Ashe v. Swenson, 397 U.S. 436, 453-54 (1970). The Defendant respectfully submits that there is no dispute that the single criminal act, occurrence, transaction and episodes were one act covering the same period of time and participants which were part of the original state indictment and conviction. In Blockburger v. United States 284 U.S. 299 (1932) the court established that a single act could be prosecuted and punished under different statutory provisions if each required proof of an element that the other did not. However, in Grady v. Corbin, 110

S. Ct. 2084 (1990), the Supreme Court significantly altered the double jeopardy analysis for multiple prosecutions. Because of a concern that Blockburger did not adequately protect defendants from the "burdens of multiple trials," Id at 2093, the Court held that the Blockburger test is only the first step in a two-part analysis. If Blockburger bars a subsequent prosecution, the inquiry ends. If, however, a subsequent prosecution survives Blockburger, it may still be barred if, in order to establish an essential element of the offense charged, the prosecution will prove conduct that constituted an offense for which the defendant was already (prosecuted). [*sic*] In applying the Grady test, courts focus on whether the conduct previously prosecuted is being used to establish an "essential element" in the second prosecution. Courts also consider whether the conduct in both prosecutions involves the same persons, locations and times. In the case at bar this is indisputable.

In Jeffers v. United States, 432 U.S. 137 (1977)(plurality opinion), the Court determined that Congress did not intend to permit cumulative punishments for engaging in a continuing criminal enterprise to violate the drug laws and for conspiring to distribute narcotics. The facts in this case and the subsequent federal indictment leave little doubt that the Defendant, if convicted under the federal indictment will be subjected to cumulative punishments after having already been sentenced to seventeen (17) years in the State District Court for the same offenses. Furthermore, as above noted, in all but two counts of the state indictment and convictions, the Defendant's sentence was enhanced by one year because of the use of a firearm. The federal indictment mirrors the state charges pursuant to 18 U.S.C. 924(c) Possession of a Firearm in the Use of a Drug Trafficking Crime which will expose the Defendant to an additional five year (5) sentencing to run consecutively to any

other potential sentence if issued by the New Mexico District Court.

COLLATERAL ESTOPPEL

The Double Jeopardy Clause embodies the corollary doctrine of collateral estoppel. Ashe v. Swenson, 397 U.S. 436 (1970). Collateral Estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit". Id at 443. Collateral estoppel may bar retrial in cases in which the Double Jeopardy Clause would not. Ashe, Supra. at 446. Two conditions must be satisfied for the doctrine to apply. First, the second prosecution must involve the same parties as the first trial. Standefer v. U.S., 447 U.S. 10, 13-14,25 (1980). Second, the issue the defendant seeks to foreclose must have been previously determined by a valid and final judgment. A review of the state prosecution, jury findings and subsequent sentencing leaves little doubt that the jury's verdict determined the issues which are also raised in the federal indictment and the defendant respectfully seeks to foreclose. The Defendant in this matter has been convicted pursuant to the commission of one act or episode and if tried and convicted pursuant to this federal indictment he would be twice punished for the same offenses.

DUAL SOVEREIGNTY

Rinaldi v. U.S., 434 U.S. 22, 28 (1977), held that federal and state governments may bring successive prosecutions for offenses arising from the same criminal act. However, dual sovereignty is subject to two limitations. First, federal authorities may not manipulate a state system to achieve the equivalent of a second federal prosecution, and the circuits have likewise held that

state authorities may not manipulate the federal system. Barkus v. U.S. 359 U.S. at 123-24.

The issues at bar are indistinguisable from the issues before the State District Court and therefore reprosecution is warranted.

WHEREFORE, Defendant respectfully request this Court to dismiss the indictment upon a finding that it is precluded pursuant to the provisions above described.

Respectfully submitted

ROBERTO ALBERTORIO
Attorney for Defendant Perez
P.O. BOX 90351
Albuquerque, New Mexico
87199
505-768-3917

I certify that a true copy
of this Motion has been filed
with the U.S. Attorney's Office
this 9th day of December, 1992

ROBERTO ALBERTORIO

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. CR92-236-JC

UNITED STATES OF AMERICA, *Plaintiff*,

v.

MIGUEL GONZALES, ET AL., *Defendant*.

[Filed Dec. 3, 1992]

UNITED STATES' RESPONSE TO MOTION TO DISMISS INDICTMENT OR, IN THE ALTERNATIVE, TO COMPEL ENFORCEMENT OF THE PETITE POLICY FILED ON NOVEMBER 18, 1992

Comes now the United States of America by and through Don J. Svet, United States Attorney for the District of New Mexico and Thomas L. English, Assistant U.S. Attorney for said District, and responds to Defendant's Motion to Dismiss Indictment as follows:

Defendant wrongly cites to *Rinaldi v. United States*, 434 U.S. 22 (1977) to support his claim that, a defendant can raise the claim of a violation of [the *Petite*] policy in federal court. *Rinaldi* does not confer a right on the defendant pursuant to the federal policy. *Rinaldi* merely holds that, [t]he defendant...should receive the benefit of the policy whenever its application is *urged by the government*. *Id.* at 31 (emphasis added).

The United States Attorney's Manual expressly states the following:

> The dual prosecution and successive federal prosecution policy statements are set forth solely for

> the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful litigative prerogatives of the Department of Justice.

United States Attorney's Manual, §9-2.142(b)(3).

The Tenth Circuit, as well as all circuits which have addressed this issue, has held that a defendant cannot invoke the Department of Justice's *Petite* policy as a bar to federal prosecution. *United States v. Thompson*, 579 F.2d 1184 (10th Cir. 1978). And see, *United States v. Howard*, 590 F.2d 564 (4th Cir. 1979); *United States v. Nelligan*, 573 F.2d 251 (5th Cir. 1978); *United States v. Frederick*, 583 F.2d 273 (6th Cir. 1978); *United States v. Hutul*, 416 F.2d 607 (7th Cir. 1969); *United States v. Wallace*, 578 F.2d 735 (8th Cir. 1978); *United States v. Snell*, 592 F.2d 1083 (9th Cir. 1979).

Moreover, the United States Supreme Court has ruled that Department of Justice policies governing its internal operations do not create rights which may be enforced by defendants. *United States v. Caceres*, 440 U.S. 741 (1979). Because there is no constitutional bar to Troup's prosecution, his motion must be denied. See, *Goode v. McCune*, 543 F.2d 751, 753 (10th Cir. 1976)(punishment by two sovereigns not constitutionally barred).

Respectfully submitted,

DON J. SVET
United States Attorney

/s/ THOMAS L. ENGLISH

THOMAS L. ENGLISH
Assistant U.S. Attorney
P.O. Box 607
Albuquerque, New Mexico 87103
(505) 766-3341

I HEREBY CERTIFY that a true copy
of the foregoing pleading was mailed
to opposing counsel of record,
Edward Bustamante, 1412 Lomas Blvd. N.W.,
Albuquerque, New Mexico 87104,
this 3rd day of December, 1992.

THOMAS L. ENGLISH

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. CR92-236-JC

UNITED STATES OF AMERICA, *Plaintiff*,

v.

ORLENIS HERNANDEZ-DIAZ, *Defendant*.

[Filed Dec. 3, 1992]

UNITED STATES' RESPONSE TO MOTION TO DISMISS INDICTMENT OR, IN THE ALTERNATIVE, TO COMPEL ENFORCEMENT OF THE PETITE POLICY FILED ON NOVEMBER 25, 1992

Comes now the United States of America by and through Don J. Svet, United States Attorney for the District of New Mexico and Thomas L. English, Assistant U.S. Attorney for said District, and responds to Defendant's Motion to Dismiss Indictment as follows:

Defendant wrongly cites to *Rinaldi v. United States*, 434 U.S. 22 (1977) to support his claim that, a defendant can raise the claim of a violation of [the *Petite*] policy in federal court. *Rinaldi* does not confer a right on the defendant pursuant to the federal policy. *Rinaldi* merely holds that, [t]he defendant. . .should receive the benefit of the policy whenever its application is *urged by the government. Id.* at 31 (emphasis added).

The United States Attorney's Manual expressly states the following:

> The dual prosecution and successive federal prosecution policy statements are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful litigative prerogatives of the Department of Justice.

United States Attorney's Manual, §9-2.142(b)(3).

The Tenth Circuit, as well as all circuits which have addressed this issue, has held that a defendant cannot invoke the Department of Justice's *Petite* policy as a bar to federal prosecution. *United States v. Thompson*, 579 F.2d 1184 (10th Cir. 1978). And see, *United States v. Howard*, 590 F.2d 564 (4th Cir. 1979); *United States v. Nelligan*, 573 F.2d 251 (5th Cir. 1978); *United States v. Frederick*, 583 F.2d 273 (6th Cir. 1978); *United States v. Hutul*, 416 F.2d 607 (7th Cir. 1969); *United States v. Wallace*, 578 F.2d 735 (8th Cir. 1978); *United States v. Snell*, 592 F.2d 1083 (9th Cir. 1979).

Moreover, the United States Supreme Court has ruled that Department of Justice policies governing its internal operations do not create rights which may be enforced by defendants. *United States v. Caceres*, 440 U.S. 741 (1979). Because there is no constitutional bar to Troup's prosecution, his motion must be denied. See, *Goode v. McCune*, 543 F.2d 751, 753 (10th Cir. 1976)(punishment by two sovereigns not constitutionally barred).

Respectfully submitted,

DON J. SVET
United States Attorney

/s/ THOMAS L. ENGLISH

THOMAS L. ENGLISH
Assistant U.S. Attorney
P.O. Box 607
Albuquerque, New Mexico 87103
(505) 766-3341

I HEREBY CERTIFY that a true copy
of the foregoing pleading was mailed
to opposing counsel of record,
Angela Arellanes, 320 Gold S.W., Suite 916,
Albuquerque, New Mexico 87102,
this 3rd day of December, 1992.

THOMAS L. ENGLISH
Assistant U.S. Attorney

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. CR92-236-JC

UNITED STATES OF AMERICA, *Plaintiff*,

v.

MARIO PEREZ, *Defendant*.

UNITED STATES' RESPONSE TO MOTION TO DISMISS ON GROUNDS OF DOUBLE JEOPARDY FILED ON DECEMBER 9, 1992

Comes now the United States of America by and through Don J. Svet, United States Attorney for the District of New Mexico and Thomas L. English, Assistant U.S. Attorney for said District, and responds to Defendant's Motion to Dismiss Indictment as follows:

Defendant properly cites to *Rinaldi v. United States*, 434 U.S. 22 (1977) for the proposition that successive state and federal prosecutions are permissable. As such, his reliance on double jeopardy and collateral estoppel is misplaced. In the present case the issue of successive prosecution involves seperate soverns and different parties. Defendant's claim against successive prosecution is properly addressed by the federal Petite Policy. This issue is addressed in *Rinaldi* which does not confer a right on the defendant pursuant to the federal policy. *Rinaldi* merely holds that, [t]he defendant...should receive the benefit of the policy whenever its application is *urged by the government. Id.* at 31 (emphasis added).

The United States Attorney's Manual expressly states the following:

> The dual prosecution and successive federal prosecution policy statements are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful litigative prerogatives of the Department of Justice.

United States Attorney's Manual, §9-2.142(b)(3).

The Tenth Circuit, as well as all circuits which have addressed this issue, has held that a defendant cannot invoke the Department of Justice's *Petite* policy as a bar to federal prosecution. *United States v. Thompson*, 579 F.2d 1184 (10th Cir. 1978). And see, *United States v. Howard*, 590 F.2d 564 (4th Cir. 1979); *United States v. Nelligan*, 573 F.2d 251 (5th Cir. 1978); *United States v. Frederick*, 583 F.2d 273 (6th Cir. 1978); *United States v. Hutul*, 416 F.2d 607 (7th Cir. 1969); *United States v. Wallace*, 578 F.2d 735 (8th Cir. 1978); *United States v. Snell*, 592 F.2d 1083 (9th Cir. 1979).

Moreover, the United States Supreme Court has ruled that Department of Justice policies governing its internal operations do not create rights which may be enforced by defendants. *United States v. Caceres*, 440 U.S. 741 (1979). Because there is no constitutional bar to defendant's prosecution, his motion must be denied. See, *Goode v. McCune*, 543 F.2d 751, 753 (10th Cir. 1976) (punishment by two sovereigns not constitutionally barred).

Additionally, the Court has denied the co-defendants' Motion to Dismiss or in the Alternative, to Compel Enforcement of the Petite Policy in an Order dated December 4, 1992.

Respectfully submitted,

DON J. SVET
United States Attorney

/s/ THOMAS L. ENGLISH

THOMAS L. ENGLISH
Assistant U.S. Attorney
P.O. Box 607
Albuquerque, New Mexico 87103
(505) 766-3341

I HEREBY CERTIFY that a true copy
of the foregoing pleading was mailed
to opposing counsel of record,
Roberto Albertorio, P.O. Box 90351,
Albuquerque, New Mexico 87199,
this 16th day of December, 1992.

/s/ THOMAS L. ENGLISH

THOMAS L. ENGLISH
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CR92-236-JC

UNITED STATES OF AMERICA, *Plaintiff*,

v.

MIGUEL GONZALES, *Defendant*.

[Filed Dec. 10, 1992]

ORDER

THIS MATTER comes on for consideration of defendant's Motion to Dismiss indictment or in the Alternative, to Compel Enforcement of the *Petite* Policy, filed November 25, 1992. The Court, having reviewed the motion and the memoranda, and being otherwise fully advised in the premises, finds that the motion is not well-taken and will be denied.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that the defendant's Motion to Dismiss Indictment be, and hereby is, denied.

DATED December 4, 1992.

/s/ JOHN E. CONWAY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CR92-236-JC

UNITED STATES OF AMERICA, *Plaintiff*,

v.

ORLENIS HERNANDEZ-DIAZ, *Defendant*.

[Filed Dec. 10, 1992]

ORDER

THIS MATTER comes on for consideration of defendant's Motion to Dismiss indictment or in the Alternative, to Compel Enforcement of the *Petite* Policy, filed November 25, 1992. The Court, having reviewed the motion and the memoranda, and being otherwise fully advised in the premises, finds that the motion is not well-taken and will be denied.

Wherefore.

IT IS ORDERED, ADJUDGED AND DECREED that the defendant's Motion to Dismiss Indictment be, and hereby is, denied.

DATED December 4, 1992.

/s/ JOHN E. CONWAY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CR92-236-JC

UNITED STATES OF AMERICA, *Plaintiff,*

v.

MARIO PEREZ, *Defendant.*

[Filed Dec. 18, 1992]

ORDER

THIS MATTER comes on for consideration of defendant's Motion to Dismiss on Grounds of Double Jeopardy, filed December 9, 1992. The Court, having reviewed the motion and the memoranda, and being otherwise fully advised in the premises, finds that the motion is not well-taken and will be denied.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that the defendant's Motion to Dismiss on Grounds of Double Jeopardy be, and hereby is, denied.

DATED December 17, 1992.

/s/ JOHN E. CONWAY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICTCOURT
FOR THE DISTRICT OF NEW MEXICO

No. CR92-236-JC 004

UNITED STATES OF AMERICA, *Plaintiff,*

v.

MIGUEL GONZALES, ET AL., *Defendant.*

OBJECTIONS TO THE PRESENTENCE REPORT AND SENTENCING MEMORANDUM

Miguel Gonzales through counsel Edward Bustamante, presents Objections to the Presentence Report prepared by Federal Probation and Sentencing Memorandum requesting downward departure.

OBJECTIONS TO THE PRESENTENCE REPORT

Miguel Gonzales was found guilty after a jury trial of the offenses Conspiracy to Possess With Intent to Distribute Less than 50 Kilograms of Marijuana in violation of 21 U.S.C. §846, Carry or Use of a Firearm During or in Relation to a Drug Trafficking Crime in violation of 18 U.S.C. §924(a)(1), and Possession With Intent to Distribute Less Than 50 Kilograms of Marijuna, in violation of 21 U.S.C. §841(a)(1).

Miguel Gonzales first objects to the factual inaccuracy in Mr. Gonzales' custodial status denying him jail credit for these offenses. Mr. Gonzales has been federal custody since October 28, 1992. A phone call to the United

States Marshall confirms his custodial status. Mr. Gonzales is entitled to jail credit from October 28, 1992 to present. Federal Sentencing Guideline Section 5G1.3(b) addressed below in this memorandum, supports Defendant's position he should be given credit for his time in federal custody.

Miguel Gonzales next objects to the factual assumption of paragraph fourteen (14) of the report under the heading *The Offense Conduct*. No evidence was produced at trial that Miguel Gonzales was in the apartment when Officer Torres was confronted by the co-defendants. No evidence was produced at trial Miguel Gonzales was seen entering the apartment immediately before or after Detective Torres was confronted by the co-defendants. Detective Torres was always in the best position to state who was in the apartment, and he so testified at trial. Officer Torres never stated Miguel Gonzales was in the apartment prior to his being bound and gagged. Paragraph fourteen's (14) assertion Miguel Gonzales left the apartment is an assumption unsupported by the evidence at trial.

Miguel Gonzales next objects to Paragraph twenty three (23) of the Presentence Report under the heading *Offense Level Computation*. The paragraph refers to applicable Victim Related Adjustments, §3A1.2.(b), under the Federal Sentencing Guidelines. The pre-sentence writer states a three level increase is warranted because Miguel Gonzales knew or should have known Officer Torres and Officer Gloria were police officers who were acting undercover before they were assaulted, and Miguel Gonzales knowing, or having reason to know the undercover agents were police officers disregarded this actual or supposed knowledge and intentionally continued his actions against police officers.

The facts of this case, and the justification given by the probation office do not support a three (3) level increase under the Federal Guidelines. Paragraph 23 justifies the increase by stating that prior to the defendants confronting Officers Gloria and Torres, the detectives were asked if they were police officers as several unmarked police units were seen in the area before the drug transaction took place.

The justification is nonsensical and misleading. If the units were unmarked there would be no suspicion the undercover agents were police. No evidence exists Miguel Gonzales ever was present, or asked any undercover officer if he was in fact a policeman. The presentence writer picks a portion of the trial when Detective Torres and Luis Leon are together in a vehicle with no other police officer or defendant present. Luis Leon asks Detective Torres if he is a police officer. Detective Torres denies being an officer, keeps his undercover status and tells Luis Leon he "feels good about the deal." Mr. Leon is apparently convinced everything is fine because the drug transaction, through the eyes of police, continues. No evidence exists Mr. Leon relayed this conversation to Miguel Gonzales. No evidence exists Mr. Gonzales was present when Detective Torres was confronted by the co-defendants. The police in this case were conducting a reverse sting operation and posed as drug sellers. Their undercover status was never revealed until Detective Torres informed the co-defendants he was a police officer. Miguel Gonzales was not present during those conversations. Detective Gloria testifed Miguel Gonzales threatened him with a gun. He did not testify he informed Miguel Gonzales he was a police officer. Miguel Gonzales did not know, and had no reason to know the undercover officers, involved in a reverse sting operation were police officers. He was not aware of their status as law enforcement officers, nor

did he disregard this knowledge and continue to act in manner creating a substantial risk of serious injury.

The presentence report misconstrues the controlling language of §3A1.2.(b)., the section states the following:

> If during the course of the offense or immediate flight therefrom, the defendant or a person for whose conduct the defendant is otherwise accountable, knowing or having reasonable cause to believe that a person was a law enforcement officer or corrections officer, assaulted such officer in a manner creating a substantial risk of serious bodily health.

A defendant must know or have reason to know a victim is a police officer, then decide to assault the victim they know, or have reason to know is a police officer. The facts of the case place Miguel Gonzales is neither category. Even if Miguel Gonzales is accountable for the actions of the co-defendants in the apartment, the co-defendants had already assaulted Detective Torres before he informed them he was a police officer. The assault occurred before the co-defendants knew the victim's status and the assault was done regardless of the victim's status. Defense counsel respectfully requests the reject the strained reality reasoning of the Presentence Report, maintain the integrity of the Federal Sentencing Guidelines and reject a three level (3) increase based on Miguel Gonzales knowing or having reason to know the undercover agents in this cause were police officers.

FEDERAL SENTENCING GUIDELINE §5G1.3(b) IS APPLICABLE

The presentence report prepared for this sentencing fails to address guideline §5G1.3.(b)., titled *Imposition of Sentence on a Defendant Subject to an Undisclosed*

Term of Imprisonment. The subsection in mandatory terms, states the sentence in this cause shall run concurrently with the state sentence in cause number 91-00770.

Federal guideline §5G1.3.(b) reads as follows:

> If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

In the Guideline Commentary Application Notes, the following example is given illustrating subsection (b)'s application

> 2. Subsection (b) (which may apply only if subsection (a) does not apply), addresses cases in which the conduct resulting in the undischarged term of imprisonment has been fully taken into account under §1B1.3 (Relevant Conduct) in determining the offense level for the instant offense. This can occur for example, where a defendant is prosecuted both in federal and state court, or in two or more federal jurisdictions, for the same criminal conduct or for different criminal transactions that were part of the same course of conduct.

Federal Sentencing Guideline §5G1.3.(a), does not apply to the instant offense. Miguel Gonzales was not under a term of imprisonment, nor had he just been sentenced for, a term of imprisonment he had not yet commenced.

Defendant's case *is* the example given in the Commentary Application Notes. The undischarged term

of imprisonment is state cause number CR 91-0770. The offenses in state criminal indictment CR 91-00770 were fully taken into account in determining the offense level for the instant offense. The section of the Presentence Report titled *The Offense Conduct* is a recitation of the offenses in state cause number 91-0770. Count VI of the undischarged prison term involves the same 100 pounds of marijuana that is the subject of the instant offense. Counts II and III of the undischarged prison term involve the armed assault by the defendants against Detectives Torres and Gloria. Even if the Court assumes the federal indictment addresses different criminal transactions, all criminal transactions were part of the same course of criminal conduct contemplated by §5G1.3.(b) and illustrated in the Commentary Application Note.

Federal caselaw requires the Court run the sentence in this cause concurrent to state cause 91-0770. In *U.S. v. Evan*,___F.2d___,No. 92-3147 WL 306189, the appellate court affirmed the sentencing court's decision in ordering defendant's federal sentence run concurrent with his state sentence where the conduct in both cases was the same. In *U.S. v. Harris*, 990 F.2d 594 (11th Cir. 1993) the Court held that §5G1.3(b) requires concurrent sentencing if a defendant is prosecuted in federal and state court for different criminal transactions that are part of the same course of conduct, such as two drug sales. Concurrent sentences for an instant offense that involves a prior undischarged prison term and successive prosecutions involving the same course of conduct is a settled area of federal guideline caselaw. *U.S. v. McCormick*, 992 F.2d 437 (2nd Cir. 1993), *U.S. v. Conkins*, 987 F.2d 564 (9th Cir. 1993), *U.S. v. Ogg*, 992 F.2d 265 (10th Cir. 1993), *U.S. v. Prusan*, 967 F.2d 57 (2nd Cir. 1992), *U.S. v. Lechuga*, 975 F.2d 397 (7th Cir. 1992. Miguel Gonzales respectfully requests the Court

run the sentence in this cause concurrent with state cause 91-0770.

§5G1.3(b) ARGUMENT FOR ADJUSTED SENTENCE

The presentence report recommends the Court deny Miguel Gonzales credit for time unquestionably spent in federal custody. Miguel Gonzales respectfully requests that if the Court denies presentence credit, the Court adjust his sentence accordingly to account for the time Miguel Gonzales is denied. An adjusted sentence accounting for denied credit is consistent with Federal Sentencing Guideline §5G1.3(b), and is not considered a downward departure for guideline purposes (See Committee Commentary Application Note).

LEGAL ARGUMENT FOR DOWNWARD DEPARTURE

Miguel Gonzales was charged and convicted of crimes against the State of New Mexico on the same set facts that led to this federal prosecution. Mr. Gonzales was convicted of armed robbery, attempt to commit armed robbery, conspiracy to commit armed robbery and conspiracy to possess over eight ounces of marijuana. State District Judge Woody Smith imposed a nineteen and one half (19 1/2) year sentence, suspended six and one half (6 1/2) years of the sentence, and ordered Miguel Gonzales be remanded to a New Mexico Correctional facility for a term of thirteen (13) years. On May 8, 1992, the Office of the United States Attorney indicted Miguel Gonzales. Miguel Gonzales will serve two sentences, from two prosecutions, arising out of one fact pattern.

Miguel Gonzales is Cuban. The judicial system in

Cuba must differ dramatically from our own. The federal prosecution and trial began while the Defendant's state case was on appeal. Defendant could not be convinced a plea in federal court would not in some way affect his state appeal. The cultural differences between societies demanded Miguel Gonzales insist on a second trial even though the trial was not in his best interest. Miguel Gonzales faces a twenty year sentence out of the state conviction. Defendant requests the Court recognize the Defendant has, and will continue to be punished for these offenses.

EDWARD O. BUSTAMANTE
1412 LOMAS BLVD., NW
ALBUQUERQUE, NM 87104
(505) 842-0392

This certifies a copy of this document was sent to AUSA, Presiliano Torres, Alonzo Padilla, Attorney for Luis Leon, Angela Arrellanes, Attorney for Orlenis Hernandez-Diaz, Roberto Albertorio, Attorney for Mario Perez, and Barbara Dominguez, Federal Presentence Unit on August 26, 1993.

EDWARD BUSTAMANTE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

Criminal No. 92-236JC

UNITED STATES OF AMERICA, *Plaintiff*,

v.

ORLENIS HERNANDEZ-DIAZ, *Defendant*.

OBJECTIONS TO THE PRESENTENCE REPORT AND SENTENCING MEMORANDUM

COMES NOW the Defendant, and pursuant to United States Constitution Amend. V, Section 6A1.3 U.S.S.G., and Rule 32(c)3 of the Federal Rules of Criminal Procedure, hereby files the following challenges, objections and sentencing memorandum to the Presentence Report prepared by the U.S. Probation Office.

FACTUAL OBJECTIONS

Page 6, paragraph 13 states that while in the bedroom Mr. Hernandez-Diaz took a pillow, placed the pillow against Torrez' head and put the gun against the pillow. The testimony at trial and the supplemental report written by Torrez states that the pillow was place in the upper torso of his body.

The same paragraph states that while in the bedroom, Detective Torrez was asked if he was a police officer, but the detective was unable to respond. The testimony at trial and the statement from Torrez is as follows: "Luis pulls, grabs that bullet and starts yelling at me saying, 'What were you doing with this gun? Were you gonna rip me off!'. . . Somebody said, 'Are you a cop?' Okay I didn't say anything, I didn't want to tell 'em I was a cop because I wasn't sure what they were gonna do."

The representation by probation is misleading because Torrez could have responded, but it was in his best interest not to say anything.

The Defendant did not provide a statement for acceptance of responsibility because the federal conviction will be appealed and the state conviction is on appeal. In the event a conviction is reversed, the statement could not be used against the Defendant. Hernandez-Diaz wished to plea the federal indictment. However, two of the codefendants refused to plea. The policy of the U.S. Attorney's office is that all defendants plea, or none plea. The policy is an abuse of power because a codefendant has no control over the decision making of another codefendant, and yet is forced to live with the consequences of another persons judgement. The Defendant asks the Court to account for the dilemma that Hernandez-Diaz was forced into.

OBJECTION TO RECOMMENDATION OF A THREE LEVEL UPWARD ADJUSTMENT UNDER U.S.S.G. 3A1.2 (b)

Page 8, paragraph 23 states "the defendant and his codefendants were all involved in the conspiracy, taking Detective Torrez hostage and holding up Detective Gloria and ordering him to return to the apartment.

Prior to this, the detectives were asked if they were police officers as several unmarked police units were seen in the area before the drug transaction took place. Therefore, a three level increase is warranted." The basis for the recommendation is that the detectives were asked if they were police officers while traveling from the Circle K to the apartment. There is no factual basis for the recommendation. First, because the statement is inaccurate. The only person asked whether he was a police officer was Detective Torrez by Luis Leon. The use of the words "detectives were asked" in the plural is misleading. Second, the factual explanation provided by probation is incomplete. When Detective Torrez was asked whether he was a police officer, he responded no so that his undercover role would not be jeopardized. Luis Leon relied on this representation by following through with the plan to take Torrez to the apartment where the exchange of money for drugs would consummate. Third, Hernandez-Diaz was not in the car when Luis Leon asked Detective Torrez if he was a cop. Therefore, Hernandez-Diaz was not privy to the conversation. No evidence exists that Mr. Leon relayed this conversation to Hernandez-Diaz.

Mr. Hernandez-Diaz was in the apartment when Miguel Gonzales pointed a gun at Detective Stan Gloria. Hernandez-Diaz was not present when the gun was pointed at Gloria and Hernandez-Diaz had no knowledge of the occurrence. This clearly cannot be attributed to Hernandez-Diaz. Mr. Hernandez-Diaz did not know, and had no reason to know, the undercover officers involved in the reverse sting operation were police officers. All defendants were led to believe that the undercover officers were drug dealers and relied on this representation until the surveillance officers kicked the front door open.

U.S.S.G. 3A1.2(b) states:

> *during the course of the offense or immediate flight therefrom, the defendant or a person for whose conduct the defendant is otherwise accountable knowing or having reasonable cause to believe that a person was a law enforcement or corrections officer, assaulted such officer in a manner creating a substantial risk of serious bodily injury,*

increase by 3 levels.

Section 3A1.2(b) "explicitly conditions the increase on the factual determination that the defendants committed such assault 'knowing or having reasonable cause to believe that a person was a law enforcement or corrections officer.' There is no room for ambiguity in its reading." *U.S v. Caslillo*, 924 F.2d 1227 (2nd Cir. 1991). Under facts similar to the case at bar, the Court held that 3Al.2(b) did not apply. In *Castillo*, undercover officer Johnson entered an apartment witn one Fernandez. A short time later Castillo entered the apartment. Fernandez then bolted and locked the apartment door. Johnson negotiated a quantity of cocaine for a price with Castillo while Fernandez stood behind Johnson. Castillo then measured 3 grams of cocaine on an index card while Fernandez walked into an adjoining room and return with a gun tucked in his waistband. After the exchange of money for cocaine, Johnson attempted to leave the apartment. Fernandez put his hand on Johnson's chest and said no. Fernandez showed the gun in his waistband to Johnson and placed his finger on the trigger. Johnson said everything is cool. Fernandez, with his hand on the gun's handle, said no. Castillo offered Johnson the cocaine on the index card. Johnson declined. Fernandez pulled the gun a little farther out of his waistband with his finger still on the trigger.

Johnson decided to ingest the cocaine after which he was allowed to leave the apartment.

The government submitted a letter in *Castillo* which stated [A]lthough the defendants did not know for sure that Officer Johnson was a police officer, they held the cocaine up to his nose and the gun to his torso precisely because they had "reasonable cause to believe" he was an undercover officer. Indeed, defendant Fernandez had less than two months prior to this offense been arrested by New York City Police for having sold cocaine to an undercover officer. The appeals court said the finding of the district court was deficient. There must be a factual finding that the defendants committed the assault "knowing or having reasonable cause to believe that a person was a law enforcement officer." *Castillo* at 1236. Given the facts of *Castillo*, the court said the findings of the district court was more the product of speculation than reasoning.

The government and the probation officer may attempt to justify the increase because Leon yelled at Torrez while Hernandez-Diaz was present in the bedroom: "What the hell were you doing with a gun? Why did you have a gun? Are you a cop?" Torrez did not respond. However, Hernandez-Diaz did not know for sure, Torrez was a police officer nor did he have reasonable cause to believe that Torrez was an officer. Hernandez-Diaz did not travel from the Circle K to the apartment and observe unmarked and marked police cars. Hernandez-Diaz at no time had knowledge of Torrez's status as a police officer until surveillance officers kicked the door yelling "police." When Hernandez-Diaz realized the police were involved, he asked Leon to

open the door and he offered no resistance. The assertion that Hernandez-Diaz knowing or had reasonable cause to believe that Torrez was a police officer is based on speculation rather than fact.

FEDERAL SENTENCING GUIDELINE SECTION 5G1.3(b) IS APPLICABLE

The presentence report prepared for this sentencing fails to address guideline Sec. 5G1.3.(b)., titled *Imposition of Sentence on a Defendant Subject to an Undisclosed Term of Imprisonment.* The subsection in mandatory terms, states the sentence in this cause shall run concurrently with the states sentence in cause number 91-0770.

Federal guideline Sec. 5G1.3(b) reads as follows:

If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrenty to the undischarged term of imprisonment.

In the Guideline Commentary Application Notes, the following example is given illustrating subsection (b)'s application

2. *Subsection (b) (which may apply only if subsection (a) does not apply), addresses cases in which the conduct resulting in the undischarged term of imprisonment has been fully taken into account under Sec. 1B1.3 (Relevant Conduct) in determining the offense level for the instant offense. This can occur for example, where a defendant is prosecuted both in federal and state court, or in two or more federal jurisdictions, for the same criminal conduct*

or for different criminal transactions that were part of the same course of conduct.

When a sentence is imposed pursuant to subsection (b), the court should adjust for any term of imprisonment already served as a result of the conduct taken into account in determining the sentence for the instant offense. Example: The defendant has been convicted of a federal offense charging the sale of 40 grams of cocaine. Under Sec. 1B1.3 (Relevant Conduct), the defendant is held accountable for the sale of a additional 15 grams of cocaine that is part of the same course of conduct for which the defendant has been convicted and sentenced in state court (the defendant received a nine-month sentence of imprisonment, of which he has served six months at the time of sentencing on the instant federal offense). The guideline range applicable to the defendant is 10-16 months (Chapter Two offense level of 14 for sale of 55 grams of cocaine; 2-level reduction for acceptance of responsibility; final offense level of 12; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge, a sentence of seven months, imposed to run concurrently with the remainder of the defendant's state sentence, achieves this result. For clarity, the court should not on the Judgment in a Criminal Case Order that the sentence imposed is not a departure from the guidelines because the defendant has been credited for guideline purposes under Sec.5G1.3(b) with six months served in state custody.

Federal Sentencing Guideline Sec. 5G1.3(a), does not apply to the instant offense. Hernandez-Diaz did not

commit the instant offense while under a term of imprisonment.

Defendant's case *is* the example given in the Commentary Application Notes. The undischarged term of imprisonment is state cause number CR 91-0770. The offenses in state criminal indictment CR 91-0770 should be fully taken into account in determining the offense level for the instant offense. The section of the Presentence Report titled *The Offense Conduct* is a recitation of the offenses in state cause number 91-0770. Count VI of the undischarged prison term involves the same 100 pounds of marijuana that is the subject of the instant offense. Counts II and III of the undischarged prison term involve the armed assault by the defendants against Detectives Torrez and Gloria. Even if the Court assumes the federal indictment addresses different criminal transactions, all criminal transactions were part of the same case of criminal conduct contemplated by Sec. 5G1.3(b) and illustrated in the Commentary Application Note.

Federal case law requires the Court run the sentence in this cause concurrent to state cause 91-0770. In *U.S. v. Evan*, __F.2d__ , No. 92-3147 WL 306189, the appellate court affirmed the sentencing court's decision in ordering defendant's federal sentence run concurrent with his state sentence where the conduct in both cases was the same. In *U.S. v. Harris*, 990 F.2d 594 (11th Cir. 1993) the Court held that Sec. 5G1.3(b) requires concurrent sentencing if a defendant is prosecuted in federal and state court for different criminal transactions that are part of the same course of conduct, such as two drug sales. Concurrent sentences for an instant offense that involves a prior undischarged prison term and successive prosecutions involving the same course of conduct is a settled area of federal guideline case law. *U.S. v.*

McCormick, 992 F.2d 437 (2nd Cir. 1993), *U.S. v. Conkins*, 987 F.2d 564 (9th Cir. 1993), *U.S. v. Ogg*, 992 F.2d 265 (10th Cir. 1993), *U.S. v. Prusan*, 967 F.2d 57 (2nd Cir. 1992), *U.S. v. Lechuga*, 975 F.2d 397 (7th Cir. 1992). Hernandez-Diaz respectfully requests the Court run the sentence in this cause concurrent with state cause 91-0770.

SECTION 5G1.3(b) ARGUMENT FOR ADJUSTED SENTENCE

The presentence report recommends the Court deny Hernandez-Diaz credit for time unquestionably spent in federal custody. Mr. Hernandez-Diaz was in federal custody from October 27, 1992 to November 15, 1992, he was writed into state custody, he was then returned into federal custody on June 9, 1993, and has remained in federal custody. Hernandez-Diaz respectfully requests that if the Court denies presentence credit, the Court adjust his sentence accordingly to account for the time Hernandez-Diaz is denied. An adjusted sentence accounting for denied credit is consistent with Federal Sentencing Guidelines Sec. 5G1.3(b), and is not considered a downward departure for guideline purposes (See Committee Commentary Application Note).

ARGUMENT FOR DOWNWARD DEPARTURE

Orlenis Hernandez-Diaz was charged and convicted on crimes against the State of New Mexico on the same set of facts that led to this federal prosecution. Mr. Hernandez-Diaz was convicted of armed robbery, attempt to commit armed robbery, conspiracy to commit armed robbery and conspiracy to possess over eight ounces of marijuana. State District Judge Woody Smith imposed twenty-two (22) years, suspended seven and one half (7 1/2) years of the sentence, and ordered Hernandez-Diaz be remanded to a New Mexico Correctional facility for a term of fourteen and one half

(14 1/2) years. On May 8, 1992, the Office of the United States Attorney indicted Hernandez-Diaz. Hernandez-Diaz will serve two sentences, from two prosecutions, arising out of one fact pattern.

Hernandez-Diaz is Cuban. The judicial system in Cuba must differ dramatically from our own. The federal prosecution and trial began while the Defendant's state case was on appeal. Defendant could not be convinced a plea in federal court would not in some way affect his state appeal. The cultural differences between societies demanded Hernandez-Diaz insist on a second trial even though the trial was not in his best interest. Defendant requests the Court recognize the Defendant has, and will continue to be punished for these offenses.

Respectfully submitted,

/s/ ANGELA ARELLANES

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This certifies that a true copy of
this document was sent to AUSA,
Presiliano Torres, Alonzo Padilla,
Attorney for Luis Leon, Ed Bustamante,
Attorney for Miguel Gonzales, Roberto
Albertorio, Attorney for Mario Perez,
Federal Presentence Unit on 3rd day
of September, 1993.

/s/ ANGELA ARELLANES

Angela Arellanes

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, *Plaintiff*,

v.

MARIO PEREZ, ET AL., *Defendant*.

OBJECTIONS TO THE PRESENTENCE REPORT AND SENTENCING MEMORANDUM

MARIO PEREZ, through counsel Roberto Albertorio, presents Objections to the Presentence Report prepared by Federal Probation and Sentencing Memorandum requesting downward departure.

OBJECTIONS TO THE PRESENTENCE REPORT

MARIO PEREZ was found guilty after a jury trial of Counts I, II, and VI of the indictment as charged.

MARIO PEREZ first objects to the factual inaccuracy of Mr. Perez' custodial status denying him jail credit for these offense. Mr. Perez has been in custody since his arrest on April 23, 1991 in the State of Florida pursuant to a warrant issued by the Second Judicial District Court, County of Bernalillo, State of New Mexico. MARIO PEREZ has been in federal custody since May 8, 1992, pursuant to the Grand Jury Indictment on this matter. Therefore, Mr. Perez is entitled to jail credit from May 8, 1992 to the present.

MARIO PEREZ next objects to the factual assumption of Paragraph fourteen (14) of the report wherein it is alleged that Mr. Perez threatened to kill Detective

Torrez and further went into the back room with co-defendant Mr. Hernandez-Diaz. The testimony at trial by Detective Torrez was that he was accosted by Mr. Hernandez-Diaz, assisted by Mr. Leon and taken into the back room by Mr. Hernandez-Diaz. There was no evidence introduced at trial by anyone that MARIO PEREZ threatened Detective Torrez or participated in his abduction and subsequent transferring into the back room. Furthermore, there was no evidence introduced at trial that MARIO PEREZ was in the back room. The official transcript will reveal that Detective Torrez was apprehended by co-defendant Hernandez-Diaz threatened and transferred to the back room with the assistance of Mr. Leon. The Court will recall that the testimony involving Mr. Perez was solely that he was in the living room of the apartment rented by Mr. Leon. Mr. Perez only involvement was requesting from Detective Torrez whether there was the actual amount of marijuana available. Detective Torrez testified that once apprehended, someone from the rear patted [*sis*] him down and removed his revolver. However, it was not clear to Detective Torrez whether this was done by either Mr. Leon or MARIO PEREZ. As Mr. Leon was later identified as the person who had Detective Torrez weapon, it can only be assumed that it was he who actually removed the officers weapon. Therefore, the conclusions drawn by the U.S. Probation Officer are without foundation unsupported by the evidence at trial and should be disregarded.

MARIO PEREZ next objects to Paragraph twenty-four (24) referencing Victim Related Adjustment. U.S. Probation requests that a three level increase is warranted because allegedly that defendant or a person for whose conduct the defendant is otherwise accountable knew or had reasonable cause to believe that a person

was a law enforcement officer, assaulted such officer in a manner creating a substantial risk of serious bodily injury.

The facts is this case, and the official trial transcript will reveal that the entire matter was under cover of unidentified police officers. At no time prior and/or immediately subsequent to the abduction of Detective Torrez was MARIO PEREZ involved in any of the negotiations with any of the officers involved in this operation. There were no marked vehicles and no one identified himself with an enforcement agency. In point of fact, even after Detective Torrez was abducted, without the participation of MARIO PEREZ, did Detective Torrez announce that he was a law enforcement officer. The Court will recall that the evidence introduced at trial was the MARIO PEREZ was not present nor involved in any way with any discussions with either Detective Torrez and Detective Gloria. The photos admitted at trial indicating the participation of the co-defendants does not include any participation by MARIO PEREZ. MARIO PEREZ participation in this entire matter was only subsequently revealed after his arrest in Florida. There was no evidence at trial that any of the Defendants knew or should have known that the undercover officers were law enforcement. Once the assisting officers revealed themselves, this entire plan was abandoned. Two of the defendants in the apartment surrendered without incident and two fled, later to be apprehended. Therefore, MARIO PEREZ, through counsel respectfully requests the Court to decline to increase the guidelines by three levels upon a finding that there is no basis for the conclusions drawn by the U.S. Probation Officer.

MARIO PEREZ next objects to Paragraph eighteen (18) referencing Adjustment for Acceptance of

Responsibility, and the denial of a two level adjustment. The official Court transcript will reveal and the Court may recall that a plea offer made by the Government was accepted by MARIO PEREZ to accept responsibility to Count II of the Indictment. This would have exposed MARIO PEREZ to a mandatory five (5) year term. The government took the position that the plea offer had to be accepted by all four defendants. As two of the co-defendants did not wish to accept the offer, MARIO PEREZ was thereby prejudiced. It is anticipated that MARIO PEREZ will seek an appeal of his conviction and any statements made to the U.S. Probation Officer regarding culpability may be used against him at a subsequent trial if MARIO PEREZ should elect to testify in his own defense. Therefore, MARIO PEREZ respectfully request the Court to apply the two level decrease in determining the appropriate level for sentencing.

Counsel for MARIO PEREZ has reviewed the objections to sentencing offer on behalf of MIGUEL GONZALES, by his attorney Edward O. Bustamante, and joins him in his motion.

WHEREFORE, Counsel for defendant MARIO PEREZ respectfully request that the Court find that there is merit in the objections filed with this motion and further determine that the appropriate level for sentencing consideration is Twenty (20) thereby providing a sentencing guideline imprisonment range of forty-one (41) to fifty-one (51) months.

Respectfully submitted

/s/ ROBERT ALBERTORIO

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I certify that a true copy
this document was delivered
AUSA Presiliano Torres and
U.S. Probation on September 8, 1993

/s/ ROBERTO ALBERTORIO

ROBERTO ALBERTORIO

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

Criminal No. 92-236 JC

UNITED STATES OF AMERICA, *Plaintiff*,

v.

ORNELIS HERNANDEZ-DIAZ, MARIO PEREZ AND MIGUEL GONZALES, *Defendants*.

SENTENCING MEMORANDUM

Comes now the United States of America by and through Larry Gomez, United States Attorney for the District of New Mexico and Thomas L. English, Assistant U.S. Attorney for said District, and for its Sentencing Memorandum states:

1. Defendants Hernandez-Diaz, Perez and Gonzales were convicted of Conspiracy to Possess Marijuana with the Intent to Distribute, Possession of a Firearm During and in Relation to a Drug Trafficking Crime, and Aiding and Abetting in violation of 21 U.S.C. § 846, 18 U.S.C. § 924(c) and 18 § U.S.C. 2, respectively. Subsequent to the conviction, the United States Probation Office prepared a pre-sentence report (PSR) which addressed the application of the United States Sentencing Guidelines (U.S.S.G.) to the respective defendants and offenses of conviction.

2. Defendant Hernandez-Diaz filed objections to the PSR regarding factual inaccuracies and the application

of the Sentencing Guidelines. This memorandum addresses application of the Sentencing Guidelines, specifically addressing § 5G1.3 Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment.

3. Section 5G1.3 U.S.S.G. provides in pertinent part:

> (b) . . . [if] the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

4. In addressing the objection regarding § 5G1.3(b), the Probation Office has stated "the sentence imposed on the instant offense should run concurrently with the State of New Mexico sentence for which the defendant is currently confined." PSR at p.3. This response is in direct contradiction to statutory authority regarding the violation of 18 U.S.C. § 924(c) which requires that the five year sentence run consecutive to any other sentence. 18 U.S.C. § 924(c); and *United States v. Lanzi*, 933 F.2d 824 (10th Cir. 1991). Accordingly, the five year statutory minimum sentence for violation of 18 U.S.C. § 924(c) must run consecutive to any other sentence, including the state sentence previously imposed.

5. The sentence for violation of 21 U.S.C. § 846, Conspiracy to Possess Marijuana with Intent to Distribute, must be imposed subject to § 5G1.3, U.S.S.G., in conjunction with 18 U.S.C. § 3584. *United States v. Shewmaker*, 936 F.2d 1124, 1127-28 (10th Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 884 (1992); and *United States v. Gullickson* 981 F.2d 344 (8th Cir. 1992).

6. From the language of § 5G1.3, and the application

notes following thereafter, the issue of concurrent versus consecutive sentences runs only to the offenses which are *fully* taken into account in the sentence for the instant offense. At the state trial, Defendants Hernandez-Diaz, Perez were convicted and sentenced for the following offenses: 9 years as to Armed Robbery; 3 years as to Attempt to Commit a Felony, to wit: Armed Robbery of Marijuana; 3 years as to Conspiracy to Commit Armed Robbery; 1 and 1/2 years as to False Imprisonment; and 1 and 1/2 years as to Conspiracy to Commit Possession of Marijuana (8 oz. or more). Second Amended Judgment Partially Suspended Sentence and Commitment attached hereto as Exhibits 1, 2 and 3. Defendant Gonzales was convicted and sentenced as the same as the other defendants, with the exception of False Imprisonment. It is the position of the United States that only the state offense of Conspiracy to Possess Marijuana involves the application of § 5G1.3(b). Thus, this Court should determine the offense level for the federal violation involving Conspiracy to Possess Marijuana with Intent to Distribute and run 18 months of that sentence concurrent with the state sentence for the same offense.

7. The remaining term of imprisonment should run consecutive to the state sentence. Should the Court find that the remaining state convictions for Armed Robbery; Attempt to Commit a Felony, to Wit: Armed Robbery of Marijuana; Conspiracy to Commit Armed Robbery; and False Imprisonment do not invoke the application of § 5G1.3(b), then § 5G1.3 (c) would apply. Application of § 5G1.3 (c) would require the Court to calculate the offense levels for the remaining state convictions as if they had been federal offenses. *See, United States v. Gullickson*, 981 F.2d 344 (8th Cir. 1992). This calculation would result in a guideline sentence which

would exceed the currently imposed state court sentence by more than sixty (60) months. Thus, this Court can order that the federal sentence, exceeding the 18 month period, run consecutive to the state sentence.

8. After applying § 5G1.3 to the offense involving Conspiracy to Possess Marijuana with Intent to Distribute, the Court then can make a determination regarding a departure from the guideline application. *See United States v. Shewmaker*, 936 F.2d 1124 (10th Cir. 1991), *cert. denied*,— U.S.,— 112 S.Ct. 884 (1992) (applying § 18 U.S.C. 3584 to U.S.S.G. § 5G1.3(a) involving offenses committed while a defendant was serving a term of imprisonment). In *Shewmaker*, the Tenth Circuit addressed the apparent conflict between 18 U.S.C. § 3584 and the Sentencing Guidelines. The Tenth Circuit ruled that the two provisions of law should be harmonized requiring the application of § 5G1.3, but indicating that the Court remains free to depart from such an application of the Sentencing Guidelines. In *United States v. Gullickson*, 981 F.2 344 (8th Cir. 1992), the Eighth Circuit stated:

> A sentencing court may, however exercise discretion under § 3584(a) and depart from the sentencing range established by § 5G1.3(c) when sufficient justification exists. In determining whether sufficient justification for departure exists, District Courts must follow usual guideline procedures. [citations omitted].

Id. at 349. In the present case, the Defendants conduct was of such a grievous nature, that an upward departure certainly is warranted.

9. It is clear that this Court does not have discretion to ignore the application of § 5G1.3, U.S.S.G. The United States respectfully requests that the Court

make a finding that the application of that section applies only to the conviction for violation of 21 U.S.C. § 846 as 18 U.S.C. § 924(c) as a statutory mandated consecutive sentence. Further, the United States requests that the Court find that the only undischarged term of imprisonment resulting from the state court conviction which invokes the application of § 5G1.3(b) is that for the Conspiracy to Possess Marijuana. Making these findings, the Court has discretion, subject to § 5G1.3(c), to run any term of imprisonment, exceeding the 18 months concurrent time to the state offense, consecutive to the state term of imprisonment. Additionally, the Court has discretion to make additional findings which would warrant a departure from the application of the sentencing guidelines, and allow the entire federal sentence to run consecutively to the state sentences.

Respectfully submitted,

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I HEREBY CERTIFY that a true copy
of the foregoing pleading was
hand delivered to opposing counsel
of record this __ day of
September, 1993.

THOMAS L. ENGLISH
Assistant U.S. Attorney

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

Criminal No. 92-236 JC 004

UNITED STATES OF AMERICA, *Plaintiff,*

v.

MIGUEL GONZALES, *Defendant.*

RESPONSE TO GOVERNMENT'S SENTENCING MEMORANDUM

The government memorandum ignores the 1992 Amendment to § 5G1.3., the Commentary Application Notes of the Federal Sentencing Guidelines, federal Guideline caselaw, the relevant conduct considered in investigating, preparing and arriving at an offense level in the Presentence Report, and the facts and history of this case. The government concedes that § 5G1.3(b) applies in part to the instant sentence. Their concession reveals the weakness of their position. By asking the court to run the federal sentence concurrent with only eighteen months of the state sentence, the government requests the court delay the commencement of the federal sentence for years until eighteen months of the state sentence remains.

1. *§ 5G1.3(b), Commentary Application Note 2. Clearly Requires the Instant Offense Run Concurrently.*

Commentary Application Note 2.; to § 5G1.3.(b) states the following:

> Subsection (b) which may only apply if subsection (a) does not apply, addresses cases in which the conduct resulting in the undischarged term of imprisonment has been fully taken into account under 1B1.3 (Relevant Conduct) in determining the offense level for the instant offense. This can occur, for example, where a defendant is prosecuted in both federal and state court, or in two or more federal jurisdictions, for the same criminal conduct or *for different criminal transactions that were part of the same course of conduct.* (Emphasis added).

§1B1.3. titled *Relevant Conduct (Factors that Determine the Guideline Range)*, encompasses Chapters Two (Offense Conduct) and Three (Adjustments) of the Federal Sentencing Guidelines. The question for the court in considering whether § 5G1.3.(b) is applicable, is whether the prior conduct, resulting in an undischarged term of imprisonment was fully taken into account in reaching the offense level for the instant offense the court is now imposing a sentence. The question for the court under the language of § 5G1.3.(b) is not whether federal prosecutors charged, or could have charged the same offenses as in state court, or whether the instant offense creates the same guideline exposure as the undischarged term of imprisonment.

In determining the guideline for the instant offense the prior conduct was fully taken into account. The government concedes the instant offense should run concurrently to the state Conspiracy to Commit Possession of Marijuana conviction. But in addition, the Presentence Unit in their *Offense Level Computation*, fully took into account the armed assault, and the binding and gagging of Detective Torrez in paragraphs twenty-three and twenty-four of the presentence report in reaching an offense level of twenty five (25). The armed assault, and restraint of Detective Torrez are inseparable from the Armed Robbery, Attempt to Commit Armed Robbery, and Conspiracy to Commit Armed Robbery resulting in the indischarged term of imprisonment. Even if the state prosecution involved different criminal transactions they are beyond question part of the same criminal conduct. Those criminal transactions and were fully taken into account in determining the instant offense level. The government's response, in essence, is that § 5G1.3.(b) is applicable in successive state-federal prosecutions *only* when the exact charges for the exact criminal transactions are reprosecuted in federal court. The government's ultra-narrow interpretation of § 5G1.3.(b), in the face of clear guidance in the Commentary Application Notes renders § 5G1.3.(b) meaningless.

Recent federal caselaw, and the facts underlying the basis of those opinions directly conflict with the government's narrow interpretation of § 5G1.3(b). In *United States v. Harris*, 990 F.2d 594 (11th Cir. 1993), the sentencing court was reversed for imposing a consecutive sentence where the government conceded the federal offense was part of the same course of conduct. *Harris*, supra, at 595. The defendant in *Harris*, was indicted and convicted on a federal drug charge. The opinion reversing makes no specific requirement the charges be exactly the same. The example given by the *Harris*, at 595, court is quite the opposite; § 5G1.3(b) requires concurrent sentencing if a defendant is prosecuted in fed-

eral and state court for different criminal transactions that are part of the same course of conduct, such as two drug sales. The opinion does not state the two drug sales need be the same type of drug, or the same quantity, or the same sale, only that the two be part of the same course of conduct.

In *United States v. Evans*, 1993 WL 306189 (7th Cir. (Ill,), the defendant was convicted in state court for the crime of Participating in a Drug Conspiracy. A year later the defendant was indicted on federal drug conspiracy charges relating to the same conduct. The sentencing court ran the federal sentence concurrent to the state sentence and subtracted 23 months from the bottom of the guideline range. The Seventh Circuit affirmed on other grounds, but noted in its affirmance the sentencing correctly applied § 5G1.3(b) court. The appellate court made no requirement the charges be identical, only that they relate to the same conduct.

2. *§5G1.3.(b) As Amended Does Not Require The Court Impose A Sentence Equal To The Total Punishment If All The Sentences Were Imposed At The Same Time.*

Commission Amendment 466 effective November 1, 1991 completely revises § 5G1.3.(b). The amended version deletes all language requiring the court impose a sentence equal to the combined punishment of all offenses as if imposed in one sentence. This court is required to apply the version of the guidelines effective at the time of sentencing. *United States v. Gross*, 979 F.2d 1048, 1050 (5th Cir. 1992).

The government requests the court look to *United States v. Gullickson*, 981 F.2d 344 (8th Cir. 1992), for guidance in this sentencing. *United States v. Gullickson*, supra, is inapplicable to the sentencing before this court.

The defendant in *Gullickson*, was sentenced under § 5G1.2(b) and § 5G1.3(c). The defendant in *Gullickson*, supra, was convicted of Forgery in state court, was then convicted of Burglary in state court, finally the defendant was charged and convicted of Aggravated Sexual Abuse in federal court. The defendant's criminal conduct and criminal transactions in *Gullickson* are not in any way related to one another. The court in *Gullickson*, never applies nor interprets the language nor the Amendments of § 5G1.3.(b). The court in *Gullickson*, examines the interplay of § 5G1.2(b), and § 5G1.3(c). This court in determining an appropriate sentence for Miguel Gonzales cannot look to *United States v. Gullickson*, supra for guidance as to whether the instant offenses should run concurrent to the prior undischarged term of imprisonment.

The government's reliance on *United States v. Shewmaker*, 936 F.2d 1124, (10th Cir. 1991), is also misplaced. *Shewmaker*, supra does not address § 5G1.3.(b). In *Shewmaker*, the defendant committed separate, unrelated criminal acts. § 5G1.3 of the Guidelines required the sentences in *Shewmaker* run consecutively. The sentencing court in *Shewmaker* ignored § 5G1.3. and sentenced the defendant to concurrent time. The appellate court held the sentencing court erred in running the defendant's sentences concurrently where clearly Guideline provision § 5G1.3., required a consecutive sentence. However; the court's analysis in *Shewmaker*, does illustrate why this court is required to run the sentences in the instant offense concurrent to Miguel Gonzales' 234 month sentence in state court.

The sentencing court in *Shewmaker*, relying on *United States v. Willis*, 881 F.2d 823 (9th Cir. 1989), ruled Guideline § 5G1.3 is *ultra vires* because it is inconsistent with 18 U.S.C. § 3584(a). § 3584(a) gives the

court statutory authority to run any sentence concurrent or consecutive.) *Shewmaker*, rejects the reasoning in *Willis*, supra, and harmonizes the interplay of 28 U.S.C. § 994(a)(1)(D); which delegates to the Sentencing Guideline Commission the authority to promulgate Guidelines regarding concurrent and consecutive sentences, 28 U.S.C. § 994(b)(1); which requires the Guidelines be consistent with 18 U.S.C. § 3584(a), 18 U.S.C. § 3584(a), and Guideline § 5G1.3.(b); which mandates concurrent sentences in certain situations.

In *Shewmaker*, Guideline § 5G1.3., and § 3584(a) are reconcilable for two reasons, first, the particular guideline at issue may suggest circumstances or factors that, if present, may provide the basis for departure and second, the court retains discretion to depart, subject to review, if it determines that factors relevant to the sentencing have not been adequately addressed by the Guidelines. *Shewmaker*, at 1127. *Shewmaker*, at 1128, describes 18 U.S.C. § 3584(a) as a general provision concerning consecutive and concurrent sentences, whereas 28 U.S.C. § 994(a)(1)(D) and Guideline § 5G1.3. are specific provisions qualifying or limiting the general provision by requiring the court depart pursuant to Guideline principles.

Applying *United States v. Shewmaker*, to the present sentencing clearly shows this court must follow the specific provision of Guideline § 5G1.3(b), and run the instant offense concurrent to the state charges. First, as argued above, it is beyond question the instant offense is the same criminal conduct, or different criminal transactions from the same criminal conduct. Second, the Presentence Report after a thorough investigation, identifies no basis for departure in the instant sentencing. (Paragraph 71., Part F. Factors That May Warrant Departure). Neither does the Presentence Report indi-

cate Miguel Gonzales impeded or obstructed justice, (Paragraph 16.), or that he had either a mitigating or aggravating role in the offense. Finally, all factors relevant to this sentencing have been addressed adequately in the Guidelines. Guideline § 5G1.3.(b) in its Commentary Application Notes uses successive state/federal prosecutions for the same conduct, or different criminal transactions out of the same criminal conduct as its example when § 5G1.3.(b) should be applied. The instant offense involves a successive state/federal prosecution for the same criminal conduct or different criminal transactions from the same course of criminal conduct. The government was required to adhere to Justice Manual § 9-2.142, the *Petite* policy before bringing this case. The Sentencing Guideline Commission has fully, and adequately addressed all relevant factors pertaining to the sentencing before this court. The fact the government opposes concurrent sentences, or are unhappy with the ultimate outcome of their successive prosecution are not relevant factors this court can consider.

Amendment 466 eliminates all language in Guideline § 5G1.3., requiring the court fashion a sentence "as if all offenses had been sentenced together." In contrast, federal caselaw continues to suggest the court ought impose a sentence in such a manner. *United States v. Harris*, 990 F.2d 594, 595 (11th Cir. 1993).

Under the circumstances of this case, Miguel Gonzales is *already* serving a sentence as if the all offenses had been imposed under Guideline principles. Miguel Gonzales was given a 234 month sentence by State District Judge Woody Smith.

In discussions with the Albuquerque Federal Presentence Unit defense counsel was informed a worst

case scenario under the Guideline for the state charges is a Guideline range of 78 to 97 months. The Attempted Armed Robbery and the Conspiracy are grouped for sentencing purposes. Miguel Gonzales faces a statutory maximum of five (5) years for the instant drug charges. Assuming the instant offense and the state offenses do not group, Miguel Gonzales under a worst case scenario, faces thirteen years, one month or 157 months, under the Federal Guidelines. If the court is required to impose a sentence equal to a sentence as if all offenses had been sentenced simultaneously, the concern of the Federal Guideline Commission that Miguel Gonzales be incrementally punished has already been addressed by the state sentence. A 234 month state sentence is substantial and severe punishment. Excluding the 18 U.S.C. § 924(c) gun enhancement, Miguel Gonzales faces less time under the Guidelines. No sound policy reason exists to incrementally punish Miguel Gonzales when he already faces a longer sentence than if he had been prosecuted in federal court on *all* counts.

3. *The Second Addendum To The Presentence Report Recommends The Instant Offense Run Concurrently.*

On September 17, 1993, the Office of Probation filed a response to the Government's Sentencing Memorandum. The probation Office contacted the United States Sentencing Commision. The Commission agrees § 5G1.3(b) applies and the instant offense should run concurrently with the state sentence.

4. *Conclusion.*

Miguel Gonzales respectfully requests the Court run the instant offense concurrently with his 234 month state sentence. He further requests the court adjust the sentence to account for his time spent in federal custody.

Respectfully submitted by,

Edward O. Bustamante
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This certifies a copy of this memorandum was sent to Alonzo Padilla, attorney for Luis Leon, Roberto Albertorio, attorney for Mario Perez, Angela Arrellanes, attorney for Orlenis Hernandez-Diaz, Presiliano Torres, AUSA, and Barbara Rodriguez, United States Probation on September 24, 1993.

Edward O. Bustamante

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. CR. 92-236JC

UNITED STATES OF AMERICA, *Plaintiff*,

v.

ORLENIS HERNANDEZ-DIAZ, *Defendants*.

DEFENDANT'S REPLY TO THE GOVERNMENT'S SENTENCING MEMORANDUM

The Court ordered the Defendant on September 8, 1993, to address two issues relating to § 5G1.3(b) in his reply to the Government's Sentencing Memorandum. First, whether the Court has discretion under § 5G1.3(b) to impose the sentence in Federal Court consecutive to the sentence imposed in State Court? Second, whether the Court has authority to depart from the guidelines? The Defendant respectfully requests the Court to impose a base offense level of twenty (20) for a period of 33-41 months. Adjust the base level by two levels pursuant to § 3A1.3 for restraint of victim. Adjust the level downward for acceptance of responsibility for a net of 33-41 months. The sentence will be increased by five (5) years pursuant to 18 U.S.C. 924(a)(1). The Defendant further requests that the sentence imposed run concurrent to the state sentence.

I. § 5G1.3(b) is mandatory in its terms that the sentence for the second conviction shall run concurrent to the sentence imposed for the first conviction for offenses that are part of the same course of conduct.

Section 5G1.3(b) states that a sentence for the instant offense "*shall be* imposed to run concurrently to the undischarged term of imprisonment" which resulted from offenses that have been fully taken into account in the determination of the offense level for the instant offense. *U.S. v. Conkins*, 987 F.2d 564 (9th Cir. 1993). The Court has no discretion to impose a consecutive sentence. *U.S. v. Harris*, 990 F.2d 594 (11th Cir. 1993). The "instant offense" is the conviction in Federal Court for Conspiracy to Possess Marijuana with Intent to Distribute, Possession of Marijuana and Possession of a Firearm During and in Relation to a Drug Trafficking Crime. The "undischarged term of imprisonment" that Defendant Hernandez-Diaz is serving is Armed Robbery (Firearm Enhancement), Attempt to Commit Armed Robbery (Firearm Enhancement), False Imprisonment (Firearm Enhancement) and Conspiracy to Commit Possession of Marijuana. The offenses in state court were fully taken into account in determining the guideline for the instant offense. The Presentence Unit fully accounted for the armed assault, the binding and gagging of Detective Torres, the restraint of Detective Torres and the use of firearms in paragraphs 23 and 24 of the presentence report.

The Government concedes the applicability of 5G1.3(b) in this case, but suggests that the court run 18 months of the federal sentence concurrent with the conspiracy to possess marijuana count of the state sentence. The balance of the term would run consecutively to the state time. The sentence suggested by the Government would delay service of the sentence of this Court for over ten (10) years, a result not intended by the Commission.

U.S. v. Harris suggests that the Court impose a sentence equal to the total punishment that would have been imposed had all sentences been imposed at the same time. However, Commission Amendment 466, effective November 1, 1991, revised § 5G1.3(b). The amendment deleted language that the Court impose a sentence equal to the combined punishment of all offenses as if imposed in one sentence.

The Constitutional basis for the sentence in the instant offense to run concurrent with the undischarged term for the state conviction is the Double Jeopardy Clause of the Fifth Amendment. "The Sentencing Commission requires concurrent sentencing in order to avoid multiple punishments." *U.S. v. McCormick*, 992 F.2d 437 at 441. (2nd Cir. 1993). The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution after conviction. It protects against multiple punishments of the same offense. *North Carolia v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d. 656 (1969). "The Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." *McCormick* at 439. Citing Exparte Lange, 85 U.S. (18 Wall). The instant conviction stems from the identical conduct, firearms and marijuana that was the basis for the conviction in state court. Defendant Henandez-Diaz received twenty-two (22) years of which seven and one half (7.5) years was suspended leaving a balance of fourteen and one half (14.5) years to serve. The imposition of a consecutive sentence in this case for any count, including use of a Firearm During or in Relation to a Drug Traffacking Crime, would run afoul with the purpose of the Double Jeopardy Clause. The Defendant is clearly being twice punished for the same offense. The

Defendant was convicted and sentenced in state court for conspiracy to possess marijuana with intent to distribute as he was in federal court. The Defendant was convicted and sentenced to four separate counts of a firearm enhancement in state court which were run consecutively. Therefore, the Defendant has been punished for use of a firearm during and relation to a drug trafficking crime. An increase of the sentence for victim related adjustments as recommended by probation have likewise been imposed by the state court. The state court imposed nine (9) years for armed robbery and eighteen (18) months for false imprisonment. Thus, the Defendant has been previously punished for the offenses now before the Court.

A consecutive sentence pursuant to 18 U.S.C. § 924(a)(1) would fragment the Court's sentence. The base level of 33-41 months, not accounting for adjustments, would be served, followed by service of the balance of the state sentence, followed by service of the federal firearm count. A concurrent sentence to the state sentence with regard to 18 U.S.C. 924(a)(1) would cure the problem caused by the successive prosecutions in state and federal court.

II. The Court has discretion, limited by 18 U.S.C. 3553(a) and 18 U.S.C. 3553(b) to depart upward, which would in effect yield a consecutive sentence.

When the sentencing guidelines require a concurrent sentence, the district court has authority under 18 U.S.C. 3584(a) to impose a consecutive sentence if it follows the procedures for departing from the guidelines. *U.S. v. Harris*, supra. *U.S. v. Shewmaker*, 936 F.2d 1124 10th Cir. (1991). The steps for departure are outlined in *Harris* and *Shewmaker* as follows. The Court has a gen-

eral grant of discretion to depart from the sentencing guidelines under 18 U.S.C. 3584(a). The court's discretion is limited by the factors listed under 18 U.S.C. 3553(a) and (b) pursuant to 18 U.S.C. 3584(b). 18 U.S.C. 3553(b) reads as follows:

> (b) ***Application of guidelines in imposing a sentence.***—*The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from the described. In determining wheather a circumstance was adquately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.*

The circumstances of this case were adequately accounted for by the Sentencing Commission. The Commission provided a specific guideline provision which addresses the sentence in federal court that is imposed after a conviction and sentence in state court based on the same criminal conduct. The application notes provide an illustration of circumstances where the guideline would apply. The facts of this case is the illustration. The specific provision controls before consideration of the general provision. *U.S. v. Shewmaker*, 936 F.2d 1124 (10th Cir. 1991). An upward departure is unwarranted in light of 5G1.3(b) and the lengthy sentence imposed in state court.

The government cites *U.S. v. Gullickson*, 981 F.2d 344 (8th Cir. 1992), for guidance in this case. *U.S. v. Gullickson*, supra, is of no use to the Court. The defendant

in *Gullickson*, was sentenced under § 5G1.2(b) and § 5G1.3(c). The defendant in *Gullickson*, supra, was convicted of Forgery in state court, was then convicted of Burglary in state court, finally the defendant was charged and convicted of Aggravated Sexual Abuse in federal court. The defendant's criminal conduct and criminal transactions in *Gullickson* were not in any way related to one another. The court in *Gullickson*, never applies nor interprets the language not the Amendments of § 5G1.3(b). The court in *Gullickson*, examines the interplay of § 5G1.2(b), and § 5G1.3(c). This court in determining an appropriate sentence for Orlenis Hernandez-Diaz cannot look to *U.S. v. Gullickson*, supra for guidance as to whether the instant offenses should run concurrent to the prior undischarged term of imprisonment.

The government's reliance on *U.S. v. Shewmaker*, 936 F.2d 1124, (10th Cir. 1991), is also misplaced. *Shewmaker*, supra does not address § 5G1.3(b). The Court addressed § 5G1.3(a) prior to the November 1, 1991 amendment. In *Shewmaker*, the defendant committed separate, unrelated criminal acts. § 5G1.3(a) of the Guidelines required the sentences in *Shewmaker* runn consecutively. The sentencing court in *Shewmaker* ignored § 5G1.3 and sentenced the defendant to concurrent time. The appellate court held the sentencing court erred in running the defendant's sentences concurrently where clearly Guideline provision § 5G1.3, required a consecutive sentence. However, the court's analysis in *Shewmaker*, provides guidance in the proper analysis in this case.

The sentencing court in *Shewmaker*, relying on *U.S. v. Willis*, 881 F.2d 823 (9th Cir. 1989), ruled Guideline § 5G1.3 is *ultra vires* because it is inconsistent with 18 U.S.C. § 3584(a). *Shewmaker*, rejects the reasoning in

Willis, supra, and harmonizes the interplay of 28 U.S.C. § 994(a)(1)(D), which delegates to the Sentencing Guideline commission the authority to promulgate Guidelines regarding concurrent and consecutive sentences, 28 U.S.C. § 994(b)(1), which requires the Guidelines be consistent with 18 U.S.C. § 3584(a), 18 U.S.C. 3584(b), and Guideline § 5G1.3(b) which mandates concurrent sentences in certain situations.

In *Shewmaker*, Guideline § 5G1.3, and § 3584(a) are reconcilable for two reasons, first, the particular guideline at issue may suggest circumstances or factors that, if present, may provide the basis for departure and second, the court retains discretion to depart subject to review, if it determines that factors relevant to the sentencing have not been adequately addressed by the Guidelines. *Shewmaker*, at 1127. *Shewmaker*, at 1128, describes 18 U.S.C. § 994(a)(1)(D) and Guideline § 5G1.3 are specific provisions qualifying or limiting the general provision by requiring the court depart pursuant to Guideline principles.

Applying *U.S. v. Shewmaker*, to the present sentencing clearly shows this court must follow the specific provision of Guideline § 5G1.3(b), and run the instant offense concurrent to the state charges. First, as argued above, it is beyond guestion the instant offense is the same criminal conduct, or different criminal transactions from the same criminal conduct. Second, the Presentence Report after a thorough investigation, identifies no basis for departure in the instant sentencing. (Paragraph 71, Part F. Factors That May Warrant Department). Neither does the Presentence Report indicate Orlenis Hernandez-Diaz impeded or obstructed justice, (Paragraph 16), or that he had either a mitigating or aggravating role in the offense.

CONCLUSION

The Memorandum by the Government ignores the Commentary Application Notes for § 5G1.3, caselaw analysis of § 5G1.3, the relevant conduct considered in the investigation, preparation and determination of the offense level in the Presentence Report, and the facts and history of this case. The caselaw is clear that the Court must first address the specific provision provided in the guidelines. If aggravating circumstances exists which were not adequately considered by the sentencing guidelines the Court has limited discretion to depart. The guidelines have adequately considered the circumstances that this case presents. Therefore, a departure is not warranted. The Defendant respectfully requests that a period of 33-41 months followed by five years be imposed, and that the sentence run concurrent to the state sentence.

Respectfully submitted,

/s/ ANGELA ARELLANES

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I hereby certify that a true
and correct copy of the foregoing pleading was mailed this
5th day of October, 1993, to Tom
English, Assistant U.S. Attorney,
and all counsel of record.

/s/ ANGELA ARELLANES

ANGELA ARELLANES

RECORD ON APPEAL

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. CR 92-236-JC

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

LUIS LEON, ET AL., *Defendants-Appellants.*

From the United States District Court

For the District of New Mexico

TRANSCRIPT OF PROCEEDINGS

VOLUME VI

September 29, 1993

APPEARANCES

FOR THE PLAINTIFF:	Mr. Presiliano Torrez Assistant U.S. Attorney 625 Silver Avenue, SW Albuquerque, New Mexico 87102
FOR THE DEFENDANT GONZALES:	Mr. Edward Bustamante Attorney at Law 1412 Lomas Boulevard, NW Albuquerque, New Mexico 87102
ALSO PRESENT:	Mr. Juan Jose Pena Official Court Interpreter

(In Open Court.)

THE COURT: We're here in the matter of the *United States of America v. Miguel Gonzales*, Criminal Cause 92-236-JC. It comes before me for sentencing.

MR. BUSTAMANTE: Ed Bustamante for Miguel Gonzales, Judge, who appears in person.

THE COURT: I'm sorry? I didn't catch the rest of what you said.

MR. BUSTAMANTE: Mr. Gonzales appears in person, Judge. I'm sorry.

MR. TORREZ: Presiliano Torrez on behalf of the United States.

THE COURT: Have you had an opportunity to review the presentence report with your client?

MR. BUSTAMANTE: Yes.

THE COURT: Mr. Gonzales, have you reviewed the presentence report with your attorney, Mr. Bustamante?

THE DEFENDANT: Yes.

THE COURT: You may proceed.

MR. BUSTAMANTE: Judge, as to the facts in the presentence report, I do have one objection. I have an objection to the actual fact or to the assumption that they make, and that is, that Mr. Gonzales was present in the apartment when Officer Torres was confronted by the other codefendants with a handgun. I don't think the testimony in the case ever established that, and Detective Torres never established that Mr. Gonzales was present in the apartment when he was confronted with a handgun.

I object to paragraph 14, Judge, because it feeds directly into paragraph 23 which is part of the offense level computation, and I would object to the three-level increase. They are classifying him in a victim-related status.

I object on several grounds, Judge: First that clearly, under the facts of this case, the officers were successful in concealing their identity because this deal continued to go on and on, on the facts, for two days; and also, Judge, they justified it by saying that a conversation with Mr. Leon and Detective Torres justifies that all of the defendants were suspicious about these people being police.

If the Court will recall the testimony, Detective Torres and Mr. Leon had this conversation when they were alone in the car and they were driving around the neighborhood. There is no testimony about Luis Leon ever relating in conversation to any of the codefendants, especially Miguel Gonzales, Judge.

And as to the conversation itself, Detective Torres denies being a police officer, says he feels good about the deal and they continue this drug deal. So again, Judge, what we have here is the officers clearly concealing their identity until things do go awry, Judge.

On those bases, Judge, I would say that this does not warrant—the facts of the case, Judge, does not warrant a three-level increase as to Miguel Gonzales. I don't think it warrants an increase, Judge. In the language of 3A1.12b, in there it states that they must know or have reason to know and then disregard that knowledge, Judge. What they're stating is they might have known this person was a police officer or some kind of law enforcement officer and then try to disregard that knowledge and continue to assault them anyway.

And the evidence in this case, again, is that the assault had already taken place, Judge. What we have here is a successful undercover operation with some very bad results. It's not a case where defendants were deciding by force to take drugs from the Albuquerque Police Department.

Judge, that's all I have, Judge, as to the offense level computation.

Judge, I would ask the Court respectfully to run this concurrent with the state sentence under 5G1.13B. I've submitted two briefs to the Court. And I think, Judge, clearly that this is the same criminal conduct or criminal—different criminal transactions for the same conduct, and I think clearly under that guideline states that this sentence should run concurrent with the state sentence already imposed.

One other question I do have, Judge, and I do raise it with some trepidation, is that I would request the Court also include the 924(c) concurrent with the state sentence. And I state that, Judge, simply because I think that refers to the federal sentence, Judge, and I would request the Court do that also.

My last request, Your Honor, is that based again on 5G1.13B, that the Court adjust the sentence it's about to impose on the underlying conditions and not depart downward, Judge, but just reflect that Mr. Gonzales has been in federal custody physically for approximately about 330 days now, Judge, and—

THE COURT: I don't think I make that determination about whether he's in federal custody or not. The Bureau of Prisons does that. I really don't think that's a finding I can make.

MR. BUSTAMANTE: I guess the reason I raise that,

Judge, is because in the presentence report and in conversations with the presentence office, they are stating that he is not entitled to any federal credit even though he's been under a writ in federal custody for the past year and a half. So I guess what I'm asking the Court to do is reflect that he has been in that custody and not depart downward in any way, just reflect that he has been in federal custody and somehow reflect that it's 330 days and that that's consistent with 5G1.13.

Judge, to give an example of how the Court can adjust the sentence downwards—

THE COURT: Why does Judge Smith sentence him to I think it was 19 years and then put him on probation for six-and-a-half? How does that work?

MR. BUSTAMANTE: I think what the judge did was impose all 19 and a half years and suspend six and a half.

THE COURT: So—

MR. BUSTAMANTE: Why he did that, I don't know.

THE COURT: In the state system, how much time will he actually serve, assuming he has good behavior time?

MR. BUSTAMANTE: I think if he receives good behavior credit, he would probably serve roughly six and a half years, Judge, assuming he does receive good time credit. And I don't know if that's going to happen or not, Judge. A lot of things can happen to prisoners while they're in the state system or federal system.

THE COURT: Mr. Torrez.

MR. TORREZ: With respect to the request for state custody, I don't—I think that the Court has hit the nail on the head, that it's got to be a determination by the

Bureau of Prisons, because there have been instances when we've had to seek a writ to get him out of state custody. So I know the entire time hasn't been spent in federal custody. So I think that's better left to them.

With respect to the request for concurrent sentences, I would ask the Court to make a determination as to the base offense level and make the determination as to how much time the Court will sentence him with respect to the narcotics offense. And then the government would take the position that only as to that narcotics offense is the same conduct applicable. Thus, subsection B is applicable for only 18 months of that sentence.

Following the serving of that 18 months on a concurrent basis, I would ask the Court to make a finding that with respect to the other portions or the other offenses of conviction in state court, the robbery, conspiracy to commit armed robbery and the attempt to commit armed robbery, that those indeed are separate offenses and that the conduct required for 924(c) is separate and apart from that, that those—that the use of the gun is all that is necessary during the course of the commission of the narcotice offense.

Thereafter, when they actually take and steal the marijuana or make that effort consummating in the attempted robbery or the armed robbery of the narcotics, that is a separate offense and it's no longer the same conduct.

And therefore, subsection C ought to be applicable, and that portion of the sentence ought to be run consecutive, and that the gun charge, with respect to 924(c), that there is no discretion with respect to running the gun charge concurrent, that that has to be run consecutive.

THE COURT: What about his argument on the additional three points?

MR. TORREZ: With respect to that, on the basis that there was conversation at—we're at a different burden of proof with respect to sentencing. There was conversation—my recollection of the testimony is there was conversation between the players in a room adjacent that Detective Torres could hear where they were discussing whether or not he was indeed a police officer. It was at that point that one of them left and they went outside, two of them armed themselves and they took Detective Gloria or assaulted Detective Gloria.

During the course of that conduct or those conversation, in fact, it was discussed that the individual might be a police officer, and certainly, that can be the motive for trying to take Gloria and imprison him as well.

So I think the Court could make a finding that based upon the conversation, the evidence that was established at trial, that indeed, while there may not be actual knowledge that he was a police officer, they had reason to believe that he was a police officer. And the Court could make that finding.

THE COURT: I'm hard-pressed, Mr. Torrez, to—I know I can do it on a technical basis, just say that the robbery part that is prosecuted in the state court is one crime over here and what he was convicted of in federal court is another crime over here, but I'm hard-pressed to say that it's not basically all one conglomeration and he should not be sentenced on that basis. In other words, I don't want to—I'm not going to give him 18 months like you suggest in your brief concurrent and then run the rest of his federal sentence consecutive.

In a—in essence, it's like when you sentence some-

body off the reservation when they've already served time for exactly the same crime on the Indian reservation and they serve time again, and I'm having a hard time separating that out. I'm going to run his sentence consecutive.

MR. TORREZ: Okay. And—

THE COURT: It might be an interesting point for you to take up on appeal and see.

MR. TORREZ: We're not going to press it. Only it's our belief that it's not a same crime test but rather the conduct, and that the conduct had ended with respect to the 924(c), and then beyond that, the robbery occurs, when they actually take possession of the controlled substance. And—I understand the Court's dilemma.

THE COURT: I deny the defendant's request for the three-level reduction. There was certainly evidence during the trial that he knew or had reasonable cause to believe that he was dealing with police officers. And at sentencing, it's not beyond a reasonable doubt. So I would make that—actually, I think the jury, by their findings made it beyond a reasonable doubt.

Do you have anything you wish to say, Mr. Bustamante, before I impose sentence?

MR. BUSTAMANTE: No, Judge.

THE COURT: Mr. Gonzales, do you have anything you wish to say before I impose sentence?

THE DEFENDANT: No, Your Honor.

THE COURT: The Court adopts the factual findings and guideline applications in the presentence report and finds there is no need for an evidentiary hearing as there are no disputed facts.

The Court finds the offense level is 25 and the criminal history category XI, establishing a guideline imprisonment range of 57 to 71 months.

However, pursuant to Section 5G1.1C of the sentencing guidelines, the guideline must not be greater than any statutorily-required maximum sentence. Therefore, the guideline imprisonment range is 57 to 60 months.

The Court finds that pursuant to 18 United States Code Section 924(c)(1), the Count V is to run consecutive with any other sentence imposed. The Court takes judicial notice that the defendant was involved in a conspiracy to purchase marijuana which resulted in an armed robbery of 45 kilograms of marijuana.

In addition, two law enforcement officers were assaulted and one was restrained. The sentence imposed will reflect the sentencing goals of punishment, deterrence and the protection of the public.

Therefore, pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that as to Counts I and VI of the indictment, 92-236-JC, that the defendant, Miguel Gonzales, is hereby committed to the custody of the Bureau of Prisons to be in prison for a term of 60 months, said sentences to run concurrently one with the other, and pursuant to section 5G1.13B of the sentencing guidelines, concurrently with the State of New Mexico sentence for which he is currently confined.

As to Count V, the defendant is hereby committed to the custody of the Bureau of Prisons to be in prison for a term of 60 months, said sentence to run consecutively to the sentence imposed under Counts I and VI and consecutively to the State of New Mexico sentence for which he is currently confined.

Upon release from confinement, the defendant shall

be placed on supervised release for a term of three years as to each count, said terms to run concurrently one with the other.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the nearest U. S. Probation Office in the district to which he is released if the defendant is not deported.

If the defendant is deported and reenters the United States during the period of supervised release, he is to report to the nearest U. S. Probation Office immediately to commence his term of supervised release.

Further, if the defendant is deportable, it is recommended that the Immigration & Naturalization Service initiate deportation proceedings prior to the defendant's release from custody.

While on supervised release, the defendant shall not commit any federal, state or local crime, shall not possess illegal controlled substances, shall comply with the standard conditionn of supervised release adopted by the Court on January 3, 1990 and the following special conditions:

The defendant shall not possess firearms, explosives or other dangerous weapons.

Based on the defendant's lack of financial resources, the Court will not impose a fine nor an additional fine which would pay government costs of any imprisonment or supervised release.

It is further ordered the defendant shall pay to the United States a special assessment of $50 as to each of the three accounts for a total of $150 which is due and payable to the Clerk of the United States District Court in Albuquerque.

The Court finds the defendant is a flight risk and a danger to the community and therefore voluntary surrender will not be granted.

Further, in accordance with Rule 32(a)2 of the Federal Rules of Criminal Procedure, you have the right to appeal the entry of this judgment within ten days.

Pursuant to 18 United States Code Section 3742, within ten days of the entry of judgment, you have the right to appeal the final sentence of this Court imposed on an offense for which a sentencing guideline has been issued by the Sentencing Commission.

Pursuant to 28 United States Code Section 994 Subparagraph (1), you have the right to apply for leave to appeal *in forma pauperis* if you are unable to pay the costs of an appeal.

MR. BUSTAMANTE: Judge, I have one question, and that is that the Court reflect that the state sentence that this is run concurrent to is 91-770. Just place the docket number on the record.

THE COURT: I'm sorry, sir?

MR. BUSTAMANTE: Just that the Court place the docket number. And the state docket number is CR 91-770.

THE COURT: All right. It will run concurrently with CR-91-770.

MR. BUSTAMANTE: Thank you, Judge.

THE COURT: Be remanded to the United States Marshals to be delivered to the Penitentiary of New Mexico. We'll be in recess.

(THEREUPON, the proceedings were concluded.)

REPORTER'S CERTIFICATE

I, Cynthia C. Chapman, Certified Court Reporter for the United States, DO HEREBY CERTIFY that I reported the foregoing case in stenographic shorthand and transcribed, or had the same transcribed under my supervision and direction, the foregoing matter, and that the same is a true and correct record of the proceedings had at that time and place.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case, and that I have no interest whatsoever in the final disposition of this case in any court.

WITNESS MY HAND AND SEAL this 24th day of January, 1994.

/s/ CYNTHIA C. CHAPMAN
CYNTHIA C. CHAPMAN

RECORD ON APPEAL
UNITED STATES COURT OF APPEALS
Tenth Circuit

No. CR92-236-JC

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

LUIS LEON, ET AL., *Defendants-Appellants.*

From the United States District Court
For the District of New Mexico

TRANSCRIPT OF PROCEEDINGS
VOLUME V

October 6, 1993

FOR THE PLAINTIFF: MR. PRESILIANO TORREZ
Assistant U.S. Attorney
625 Silver Avenue, SW
Albuquerque, New Mexico 87102

FOR THE DEFENDANT HERNANDEZ-DIAZ: MS.ANGELA ARELLANES
Attorney at Law
800 Park, SW
Albuquerque, New Mexico 87102

(In Open Court.)

THE COURT: Next matter is the *United States of America v. Orlenis Hernandez-Diaz*, Criminal Cause 92-236-JC.

MS. ARELLANES: Angela Arellanes for Mr. Hernandez-Diaz. Mr. Hernandez is present in the courtroom.

THE COURT: All right. Have you had an opportunity to review the presentence report with your client?

MS. ARELLANES: I have, Your Honor. A report has been provided to him as well.

THE COURT: Have you reviewed it with him?

MS. ARELLANES: And I have reviewed it, too.

THE COURT: All right. Mr. Hernandez, have you reviewed the presentence report with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Is there anything in the presentence report you want to call to my attention?

THE DEFENDANT: No, sir.

THE COURT: All right. Do you want to go over your objections to the presentence report with me?

MS. ARELLANES: Yes, Your Honor. First objection of course is the official victim objection for the reason that Mr. Hernandez-Diaz did not know that Detective Torres was a police officer. If he had known he was a police officer, he certainly would not have negotiated a drug deal, one, and two, he certainly would not have held Detective Torres hostage. Two, he learned of Detective Torres' official status after the fact, after everything had blown over. So I would ask the Court

not to increase the level for that adjustment.

I would ask the Court to impose a period of 33 months increased by five years for the gun count and, of course, the gun count would run consecutive to the 33 months. The reason I'm asking for a period of 33 months is because Mr. Hernandez-Diaz wished to plead. But for the fact that two of the codefendants refused to plead and but for the fact that the U.S. Attorney's Office has a policy regarding package deals, Mr. Hernandez-Diaz would have pled.

And so I would ask that the Court take that into consideration.

I ask the Court to run the gun counts—this sentence concurrent with the state sentence for the reason that a consecutive sentence, first of all, would be in violation of the double jeopardy clause. It would also fragment this Court's sentence. In essence, what would happen was that the 33 months, if the Court imposed 33 months, would start on today's sentence, and then Mr. Hernandez-Diaz would serve the balance of the state sentence, of which he is serving 14 and a half years, and then the gun count sentence would start. So essentially, there would be a gap in the sentence. And in order to avoid that, a concurrent sentence with all counts, I think, would cure that dilemma.

The other reason is because Mr. Hernandez-Diaz is serving multiple gun counts relating to the same guns in state court. He received four firearm enhancements for four separate charges relating to the same guns.

So I would ask the Court—and that essentially is the same offense. So I would ask the Court run the gun count concurrent with the gun counts that were imposed in state court.

Mr. Hernandez-Diaz, this is his first offense. He has learned very painfully, in a very severe manner that crime does not pay. There is more to life than fancy cars and nice clothes. And what's more—more than anything is his liberty. He understands that he has to pay for what he did. And he has paid dearly. He has paid severely. I would ask that the Court take that into consideration.

With regard to presentence confinement time, Mr. Hernandez-Diaz has been in custody in federal custody since June. He was previously in federal custody for a short period of time in October earlier before then, and it's in my presentence report the objections.

My understanding is that the Bureau of Prisons will credit the defendant based on the information on a cover sheet, and so I would ask the Court make a specific ruling regarding whether Mr. Hernandez-Diaz would get credit for the time that he's been in federal custody. With that in mind, I would ask the Court to impose 33 months followed by five years concurrent with the state sentence.

THE COURT: Well, I'm not sure I follow you on the cover sheet. My understanding of the Bureau of Prisons is they look into the entire time he's been in custody and where he's been, and they make a determination whether he gets credit on his federal sentence or not.

MS. ARELLANES: Your Honor, quite frankly, I just learned this this afternoon from Terry Storch. My understanding is that's the way it works. So—and apparently, there's a line of cases regarding tribal convictions where an Indian defendant is convicted in tribal court for the same offenses—he's convicted in federal court, and of course, he is credited towards that period of time that he was in tribal court towards the federal

conviction. And I think that line of cases would also apply over here.

THE COURT: I don't know whether that's exactly correct. Tribal court—you know, that's two separate jurisdictions. I take that into consideration sometimes when I sentence. But I don't think the tribal courts have to—I don't think they give credit—get credit specifically. Well, he's going to be serving enough time in the state, so it's not going to make any difference. The only thing you brought up that requires a factual determination that I can see is whether or not he knew he was a police officer.

There was ample testimony at the trial to show that it became known to some of the defendants that they were involved with a police officer when they bound and gagged him and put a gun to his head. So I'll give him the three points on that.

I don't think anything else you're arguing that needs a factual determination.

Do you have anything further you wish to say on behalf of your client before I impose sentence?

MS. ARELLANES: No, Your Honor.

THE COURT: Mr. Hernandez-Diaz, do you have anything you wish to say before I impose sentence?

THE DEFENDANT: No, thank you. My attorney has spoken for me.

THE COURT: The Court adopts the factual findings and guideline applications in the presentence report and finds there is no need for an evidentiary hearing as there are in disputed facts.

The Court finds the offense level is 25 and the criminal history category is I, establishing a guideline imprisonment range of 57 to 71 months.

However, pursuant to Section 5G1.1C of the sentencing guidelines, the sentence must not be greater than the statutory maximum sentence. Therefore, the guideline imprisonment range is 57 to 60 months.

The Court also finds that pursuant to 18 United States Code Section 924(c)(1), Count III is to run consecutive to any other sentence imposed.

The Court takes judicial notice that the defendant was involved in a conspiracy to purchase marijuana which resulted in the defendants' robbing an undercover agents of 45 kilograms of marijuana.

In addition, two law enforcement officers were assaulted and one was physically restrained by the defendant. The sentence imposed will reflect the sentencing goals of punishment, deterrence and the protection of the public.

Therefore, pursuant to the Sentencing Reform Act of 1984, it is judgment of the Court that as to Counts I and VI, that the indictment, 92-236-JC, that the defendant, Orlenis Hernandez-Diaz, is hereby committed to the custody of the Bureau of Prisons to be in prison for a term of 60 months, said sentences to run concurrently one with the other pursuant to Section 5G3b of the Sentencing Guidelines concurrently with the State of New Mexico sentence for which he is currently confined.

As to Count III, the defendant is hereby committed to the custody of the Bureau of Prisons for a term of five years, said sentence to run consecutively to the sentence imposed on Counts I and VI and consecutively to the State of New Mexico sentence for which he is currently confined.

Upon release from confinement, the defendant shall be placed in supervised release for a term of three years

as to each count, said terms to run concurrently one with the other.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the nearest U. S. Probation Office in the district to which he is released, if the defendant is not deported.

If the defendant is deported and reenters the United States during the period of supervised release, he is to report to the nearest U. S. Probation Office immediately to commence his term of supervised release.

Further, if the defendant is deportable, it is recommended that the Immigration & Naturalization Service initiate deportation proceedings prior to the defendant's release from custody.

While on supervised release, the defendant shall not commit any federal, state or local crime, shall not possess illegal controlled substances, shall comply with the standard conditions of supervised release adopted by the Court on January 3, 1990 and the following special conditions:

The defendant shall not possess firearms, explosives or other dangerous weapons.

Based on the defendant's lack of financial resources, the Court will not impose a fine nor an additional fine which would cover the government's cost of any imprisonment or supervised release.

It is further ordered the defendant shall pay to the United States a special assessment of $50 as to each Count I, III and VI for a total of $150, which is due and payable immediately to the Clerk of the United States District Court in Albuquerque.

Further, in accordance with Rule 32(a)2 of the

Federal Rules of Criminal Procedure, you have the right to appeal the entry of this judgment within ten days. Pursuant to 18 United States Code Section 3742, within ten days after the entry of the judgment, you have the right to appeal the final sentence of this Court imposed on an offense for which a sentencing guideline has been issued by the Sentencing Commission.

Pursuant to 28 United States Code Section 994 Subparagraph (1), you have the right to apply for leave to appeal *in forma pauperis* if you are unable to pay the costs of an appeal.

Be remanded to the custody of the United States Marshals to be delivered to the State of New Mexico.

(THEREUPON, the proceedings were concluded.)

REPORTER'S CERTIFICATE

I, Cynthia C. Chapman, Certified Court Reporter for the United States, DO HEREBY CERTIFY that I reported the foregoing case in stenographic shorthand and transcribed, or had the same transcribed under my supervision and direction, the foregoing matter, and that the same is a true and correct record of the proceedings had at that time and place.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case, and that I have no interest whatsoever in the final disposition of this case in any court.

WITNESS MY HAND AND SEAL this 24th day of January, 1994.

/s/ CYNTHIA C. CHAPMAN

CYNTHIA C. CHAPMAN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
HONR. JOHN E. CONWAY, JUDGE PRESIDING

No. CR92-236-JC

UNITED STATES OF AMERICA, *Plaintiff,*

v.

MARIO PEREZ, ET AL., *Defendants.*

REPORTER'S TRANSCRIPT OF PROCEEDINGS
October 6, 1993

APPEARANCES

FOR THE PLAINTIFF: OFFICE OF THE U.S. ATTORNEY
625 Silver Ave., Southwest
Albuquerque, New Mexico
87102
BY: MR. DAVID WILLIAMS

FOR THE DEFENDANT: MR. ALBERTO ALBERTORIO
Attorney at Law
6229 Salt Cedar Road
Rio Rancho, New Mexico
87124

(In Open Court.)

THE COURT: Next matter is the *United States of America v. Mario Perez,* Criminal Cause Number 92-236-JC. All right, Mr. Albertorio. Have you had an opportunity to review the presentence report with your client?

MR. ALBERTORIO: Yes, Your Honor. May it please the Court, before we proceed, we would request that the courtroom be cleared of anyone who is not court personnel or a court officer in lieu of certain things that we want to bring to the attention of the Court.

I have discussed this matter with Pres Torrez, who Mr. Williams is standing in for him, and he had no objection. I also advised the Court and the Judge's personnel of that fact, and that is why my client is being sentenced at a separate time.

THE COURT: Well, all right. Let's clear the courtroom, then.

(Discussion held off the record.)

MR. ALBERTORIO: Thank you, Your Honor.

Your Honor, in response to the question, yes, I have had an opportunity to review the report with my client. He has read the report. The Court is aware that I filed objections to the conclusions of that report.

For purposes of brevity, in light of the Court's rulings on the codefendants who have raised similar objections, I will not go into any greater detail with regard to my motion, with the exception of one area, Your Honor.

I would like to point out—

THE COURT: Let me just ask your client something first. Mr. Perez, have you had an opportunity to discuss

the presentence report with your attorney?

THE DEFENDANT: Yes.

THE COURT: All right. Is there anything in the presentence report you want to call to my attention?

THE DEFENDANT: No, everything is okay.

THE COURT: All right. Mr. Albertorio.

MR. ALBERTORIO: Thank you, Your Honor. Just with regard to the area of acceptance of responsibility, the Court may recall that throughout the proceedings, we took the position that our client should be severed from the other defendants. And the Court may recall that I was principally involved with negotiations with the government with regard to a plea offer prior to trial.

When the government rested, there was a, as I recall, another plea offer which my client was prepared to accept, and I brought that to the attention of the Court, as well as one other codefendant. However, the government's position was, and apparently continues to be, that if this plea offer is not accepted by all defendants, that the government would not submit, if you will, or would not agree with the plea offer to one defendant.

And the Court may recall that, at the time, the Court raised the Court's concern that the government has always taken this posture. And if I may paraphrase, I believe the Court said that you didn't understand why they continue to take that position. The plea offer at that time would have been a plea of guilty to—guilty to the 924 exposing my client to a five-year term.

As a result of the government position, my client was therefore required to continue with the trial to try to present his defense and was subsequently prejudiced, in my view, with regard to the ultimate finding of guilty.

And now the potential exposure with regard to the recommendations of the report.

So I would urge the Court to take into consideration that there was a showing of acceptance of responsibility.

Now, while my client has not discussed any involvement with the probation officer in the preparation of this report, the reasons for that are that there may be an appeal. And if you subsequently want to take—give testimony at a subsequent trial, any discussions he may have had as a part of this presentence report may be used to impeach him. So I would urge the Court to give some consideration to the fact that there was at one time.

THE COURT: Do you have any case authority to back that up?

MR. ALBERTORIO: I don't have any case authority for that, Your Honor. But it seems to be the general understanding that there is that probability. These reports are part of the public record. There is no confidentiality that attaches to that. And it's my understanding that it's the general position from the defendants and defense counsel that if there is a potential appeal with a subsequent trial, that if there has been some type of admission, vis-a-vis acceptance of responsibility, and a person—and then the defendant takes the witness stand, certainly that could be an area that would be probed.

There might be a preliminary ruling, if defense counsel is aware that the government wishes to pursue that line, and we may get a Court ruling at that time. I have not had that experience. But it is the—was the concern of my client. So I would urge the Court to grant the two-level reduction and reduce the potential level of 25 to 23.

Of course, my initial motion, objections to the presentence report, had urged the Court to consider a level 20. That's all we have. In terms of the guidelines, we would urge sentencing at the lower end.

Now, there may be some other things that I would like to bring to the attention of the Court. And I can do that prior to your issuing of the sentence, or subsequently, if the Court would prefer.

THE COURT: Well, I'm not quite sure what it is you want to bring to my attention.

MR. ALBERTORIO: Well, for several months now, Your Honor, my client has been desirous of talking with the government. He believed that he can provide information of considerable proportions. The government has taken the position that they want to discuss this with my client. However, they've indicated that they would prefer that the sentence be issued prior to the discussions.

My concern, Your Honor, has been that if any of this information turns out to be of some value in preparing the entire scenario, if you will, for an ultimate conviction, etc., I suspect that that would exceed the one-year period, and therefore, my client would not have the benefit of coming before this Court for a reconsideration of sentencing.

We started negotiating early on so that some initial investigations would occur. I might point out to the Court that this information would not involve New Mexico. It would involve Florida, cartel participants, and it appears to be of great proportions. And it just seems to me, however swift the government may be, they will not be able to do that within one year. So—

THE COURT: No, I don't agree with you, sir. I think that my experience has been that if he can provide

worthwhile information, the government has been very prompt in filing 5K1s. And so I don't think that's a real concern. I understand the government position, that they want him sentenced to find out what he knows after that. So I don't think I need to hear any more.

MR. ALBERTORIO: I understand that. If we can have some assurances as to the 5K, again, the 5K—

THE COURT: He can't give you any assurances unless your client delivers something they can use.

MR. ALBERTORIO: I understand. But also, Your Honor, if I may, with all due respect, the 5K can ask for a modification, but the length of the modification is premised on how much information. And usually, that involves convictions, possibly providing testimony and the like. And certainly, we would like to see it done with all deliberate speed.

It just seems to me, if the prosecution is done here or in Florida or whatever, that the one year may, you know, may have already been passed. But I suspect that's academic. We're already here. I just wanted to bring it to the Court's attention.

THE COURT: I'm sure the U. S. Attorney, if he does have information, will act on it expeditiously.

MR. ALBERTORIO: Thank you, Your Honor.

THE COURT: Mr. Perez, do you have anything you wish to say before I impose sentence?

THE DEFENDANT: No, it's all right.

THE COURT: All right. The only evidentiary matter that you brought up, and you heard my rulings in the other two sentences, is there is ample testimony that the individuals knew you were dealing with police officers. And a three-level increase is warranted along with

a two-level increase to an offense level of 25.

The Court adopts the factual findings and guideline applications in the presentence report and finds there is no need for an evidentiary hearing as there are no disputed facts .

The Court finds the Offense Level is 15 and the criminal history category is III, establishing a guideline imprisonment range of 70 to 87 months.

The Court also finds that, pursuant to 18 United States Code 924(C)(1), Count II is to run consecutively to any other sentence imposed.

The Court takes judicial notice that the defendant has developed a pattern of criminal behavior revolving around drug distribution and violence.

In the instant offense, a law enforcement officer was restrained and threatened with his life as the defendant attempted to purchase 45 kilograms of marijuana without payment.

The sentence imposed will reflect the sentencing goals of punishment, deterrence and the protection of the public.

Therefore, pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that, as to Counts I and VI of the indictment, 92-236-JC, that the defendant, Mario Perez, is hereby committed to the custody of the Bureau of Prisons, to be in prison for a term of 87 months, said sentencing to run concurrently one with the other, and pursuant to 5G1.13B of the Sentencing Guidelines, concurrently with the State of New Mexico sentence for which he is currently confined.

As to Count II, the defendant is hereby committed to the custody of the Bureau of Prisons to be in prison for a

term of 60 months, said sentencing to run consecutively on the Counts I and VI and consecutively to the State of New Mexico sentence to which he is currently confined.

Upon release from confinement, the defendant shall be placed on supervised release for a term of three years as to each count, said terms to run concurrently one with the other.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the nearest U. S. Probation Office in the district to which he is released, if the defendant is not deported.

If the defendant is deported and reenters the United States during the period of supervised release, he is to report to the nearest U. S. Probation Office immediately to commence his term of supervised release.

Further, if the defendant is deported, it is recommended that the Immigration & Naturalization Service initiate deportation proceedings prior to the defendant's release from custody.

While on supervised release, the defendant shall not commit any federal, state or local crime, shall not possess any illegal controlled substances, shall comply with the standard conditions of supervised release adopted by the Court on January 3, 1990, and the following special conditions:

The defendant shall not possess firearms, explosives or other dangerous weapons.

The defendant shall participate as directed in a program for substance abuse approved by the U. S. Probation Office, which may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

Based on the defendant's lack of financial resources, the Court will not impose a fine nor an additional fine which would pay government costs of any imprisonment or supervised release.

It is further ordered the defendant shall pay to the United States a special assessment of $50 each as to Counts I, II and VI, for a total of $150, which is payable to the United States District Court in Albuquerque immediately.

The Court finds the defendant is a flight risk and a danger to the community, and therefore, voluntary surrender will not be granted.

Further, in accordance with Rule 32(a)2 of the Federal Rules of Criminal Procedure, you have the right to appeal the entry of this judgment within ten days.

Pursuant to 18 United States Code Section 3742, within ten days of the entry of judgment, you have the right to appeal the final sentence of this Court imposed on an offense for which a sentencing guideline has been issued by the Sentencing Commission.

Pursuant to 28 United States Code Section 994 subparagraph (1), you have the right to apply for leave to appeal *in forma pauperis*, if you are unable to pay the costs of an appeal.

You will be remanded to the custody of the United States Marshals and be delivered to the State of New Mexico.

MR. ALBERTORIO: Thank you very much, Your Honor.

(Proceedings concluded.)

REPORTER'S CERTIFICATE

I, Cynthia C. Chapman, Certified Court Reporter for the United States, DO HEREBY CERTIFY that I reported the foregoing case in stenographic shorthand and transcribed, or had the same transcribed under my supervision and direction, the foregoing matter, and that the same is a true and correct record of the proceedings had at that time and place.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case, and that I have no interest whatsoever in the final disposition of this case in any court.

WITNESS MY HAND AND SEAL this 3rd day of July, 1996.

/s/ CYNTHIA C. CHAPMAN

CYNTHIA C. CHAPMAN

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA

v.

MIGUEL GONZALES

Name:	Miguel Gonzales
DOB:	February 18, 1963
SSN:	589-38-9962
Co. Reg.	Out of
To Vote	State
Mailing Address:	18471 41st Street North Loxahatchee, Florida 33410 (In custody, U.S. Marshal Service)
Residence Address:	18471 41st Street North Loxachatchee, Florida 33410

Edward Bustamante—Appointed
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

Filed: 10-14-93
__ guilty __nolo contendere as to count(s) _____
X not guilty as to counts 1, V and VI of Indictment 92-236JC filed on May 8, 1992

THERE WAS A:

__ finding X verdict of guilty as to count(s) I, V and VI of Indictment 92-236JC filed on May 8, 1992

__ As tried to the Court. X As tried before a jury.

THERE WAS A:

__ finding __ verdict of guilty as to count(s) _____

__ Judgment of acquittal as to count(s) _____

The defendant is acquired and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: (Fel. X Misd.__)

Conspiracy to Possess with Intent to Distribute less than 50 kilograms of Marijuana, in violation of 21 USC 846, and Aiding and Abetting, in violation of 18 USC 2, as charged in Count I; Carry or Use of a Firearm During or in Relation to A Drug Trafficking Crime, in violation of 18 USC 924(c)(1), 18 USC 924(a)(2), and Aiding and Abetting, in violation of 18 USC 2, as charged in Count V; Possession with Intent to Distribute less than 50 kilograms of Marijuana, in violation of 21 USC 841(a)(1) and 21 USC 841(b)(1)(D), as charged in Count VI, of Indictment 92-236JC filed on May 8, 1992.

The Court adopts the factual findings and guideline applications in the presentence report and finds that there is no need for an evidentiary hearing as there are no disputed facts.

The Court finds that the offense level is twenty-five (25) and the criminal history category is I, establishing a guideline imprisonment range of fifty-seven (57) to seventy-one (71) months. However, pursuant to Section 5G1.1(c) of the sentencing guidelines, any sentence imposed may not be greater than the statutorily required maximum sentence; therefore, the guideline imprisonment range is restricted to a range of fifty-

seven (57) to sixty (60) months. The Court also finds that pursuant to 18 U.S.C. § 924(c)(1), the sentence imposed on Count V shall run consecutively to any other sentence imposed. The Court takes judicial notice that the defendant was involved in a conspiracy to purchase marijuana which subsequently resulted in an armed robbery of the 45 kilograms of marijuana involved in the conspiracy. In addition, two law enforcement officers were assaulted and one was restrained. The sentence imposed will reflect the sentencing goals of punishment, deterrence, and protection of the public.

Therefore, pursuant to the Sentencing Reform Act of 1984. it is the judgment of the Court as to each of Counts I and VI of Indictment 92-236JC, that the defendant, Miguel Gonzales, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of sixty (60) months; said sentences to run concurrently, one with the other and, pursuant to 5G1.3(b) of the sentencing guidelines, concurrently with the State of New Mexico sentence for which the defendant is currently confined. As to Count V, the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of sixty (60) months; said sentence is to run consecutively to the sentence imposed on Counts I and VI, and consecutively with the State of New Mexico sentence for which he is currently confined. Upon release from confinement, the defendant shall be placed on supervised release for a term of three (3) years as to each of Counts I, V and VI; said terms to run concurrently, one with the other. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the nearest U.S. Probation Office in the district to which he is released, if the defendant is not deported. If the defendant is deported and reenters the United States during the

period of supervised release, he is to report to the nearest U.S. Probation Office immediately to commence his term of supervised release. Further, if the defendant is deportable, it is recommended that the Immigration and Naturalization Service initiate deportation proceedings prior to the defendant's release from custody. While on supervised release, the defendant shall not commit any federal, state, or local crime, shall not possess illegal controlled substances, shall comply with the standard conditions of supervised release adopted by the Court on January 3, 1990, and the following special condition:

1) The defendant shall not possess firearms, explosives, or other dangerous weapons.

Based on the defendant's lack of financial resources, the Court will not impose a fine or an additional fine which will pay government costs of any imprisonment or supervised release.

The Court finds the defendant is a flight risk and a danger to the community; therefore, voluntary surrender shall not be granted.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on Page Three of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) Refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer.

(2) Associate only with law-abiding persons and main-

tain reasonable hours.

(3) Work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes).

(4) Not leave the judicial district without permission of the probation officer.

(5) Notify your probation officer immediately of any changes in your place of residence.

(6) Follow the probation officer's instructions and report as directed.

The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

It is further ordered that the defendant shall pay to the United States a Special Assessment of $50.00 as to each of Counts I, V, and VI, for a total of $150.00, which shall be due immediately and payable by cashier's check, bank or postal money order to the United States District Court Clerk, Post Office Box 689, Albuquerque, New Mexico 87103.

Original Fine Amount:_____
Amount Due: _____
Schedule of Payments: _____

Original Restitution Imposed: _____

Amount Due: _____
Payable To: _____

Schedule of Payments: _____

IT IS FURTHER ORDERED that until the judgment is paid in full, the defendant shall notify the United States Attorney of any change in address within 30 days of that change.

IT IS FURTHER ORDERED that count(s) _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the clerk of the Court deliver a certified copy of the judgment to the United States Marshal of this district.

__The Court orders commitment to the custody of the Bureau of Prisons and recommends:

September 30, 1993
Date of Imposition of Sentence

Signature of Judicial Officer

John E. Conway, United States District Judge
Name and Title of Judicial Officer

Date: October 12, 1993

In accordance with Rule 32(a)(2) of the Federal Rules of Criminal Procedure, you have the right to appeal the entry of this judgment within ten (10) days. Further, pursuant to 18 USC 3742, within ten (10) days of the entry of the judgment, you have the right to appeal the final sentence of this Court imposed on an offense for which a sentencing guideline has been issued by the Sentencing Commission pursuant to 28 USC 994(1). You have the right to apply for leave to appeal *in forma pauperis* if unable to pay the cost of an appeal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____to _____ at, _____, the institution designated by the Bureau of Prisons, with a certified copy of this Judgment in a Criminal Case.

_____

United States Marshal

BY: _____

Deputy Marshal

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW MEXICO

_____

UNITED STATES OF AMERICA

v.

ORLENIS HERNANDEZ-DIAZ

_____

Name:	Orlenis Hernandez-Diaz
DOB:	December 16, 1965
SSN:	592-96-8181
Co. Reg. To Vote	Santa Fe County
Mailing Address:	P.O. Box 1059 Santa Fe, New Mexico 87504-1059 (In custody, U.S. Marshal Service)
Residence Address:	P.O. Box 1059 Santa Fe, New Mexico 87504-1059

Angela Arellanes—Appointed Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

Filed: 10-20-93

__guilty __nolo contendere as to count(s)_____

X not guilty as to count(s) I, III and VI of Indictment 92-236JC filed on May 8, 1992

THERE WAS A:

__finding X verdict of guilty as to count(s) I, III and VI of Indictment 92-236JC filed on May 8, 1992

__As tried to the Court. X As tried before a jury.

THERE WAS A:

__finding __verdict of guilty as to count(s) _____

__Judgment of acquittal as to count(s) _____

The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: (Fel. X Misd.__)

Conspiracy to Possess with Intent to Distribute less than 50 kilograms of Marijuana, in violation of 21 USC 846, and Aiding and Abetting, in violation of 18 USC 2, as charged in Count I; Carry or Use of a Firearm During or in Relation to A Drug Trafficking Crime, in violation of 18 USC 924(c)(1), 18 USC 924(a)(2), and Aiding and Abetting, in violation of 18 USC 2, as charged in Count III; Possession with Intent to Distribute less than 50 kilograms of Marijuana, in violation of 21 USC 841(a)(1) and 21 USC 841(b)(1)(D), as charged in Count VI, of Indictment 92-236JC filed on May 8, 1992.

The Court adopts the factual findings and guideline applications in the presentence report and finds that there is no need for an evidentiary hearing as there are no disputed facts.

The Court finds that the offense level is twenty-five (25) and the criminal history category is I, establishing a guideline imprisonment range of fifty-seven (57) to seventy-one (71) months. However, pursuant to Section 5G1.1(c) of the sentencing guidelines, the sentence must not be greater than the statutory maximum sentence; therefore, the guideline imprisonment range is fifty-seven (57) to sixty (60) months. The Court also finds

that pursuant to 18 U.S.C. § 924(c)(1), Count III is to run consecutively to any other sentence imposed. The Court takes judicial notice that the defendant was involved in a conspiracy to purchase marijuana which resulted in the defendants robbing the undercover agents of 45 kilograms of marijuana. In addition, two law enforcement officers were assaulted and one was physically restrained by the defendants. The sentence imposed will reflect the sentencing goals of punishment, deterrence, and protection of the public.

Therefore, pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court as to Counts I and VI of Indictment 92-236JC, that the defendant, Orlenis Hernandez-Diaz, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of sixty (60) months, said sentences to run concurrently, one with the other, and, pursuant to 5G1.3(b) of the sentencing guidelines, concurrently with the State of New Mexico sentence for which he is currently confined. As to Count III, the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of sixty (60) months, said sentence is to run consecutively to the sentence imposed on Counts I and VI and consecutively to the State of New Mexico sentence for which he is currently confined. Upon release from confinement, the defendant shall be placed on supervised release for a term of three (3) years as to each count, said terms to run concurrently, one with the other. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the nearest U.S. Probation Office in the district to which he is released, if the defendant is not deported. If the defendant is deported and reenters the United States during the period of supervised release, he is to report to the nearest U.S. Probation Office immediately

to commence his term of supervised release. Further, if the defendant is deportable, it is recommended that the Immigration and Naturalization Service initiate deportation proceedings prior to the defendant's release from custody. While on supervised release, the defendant shall not commit any federal, state, or local crime, shall not possess illegal controlled substances, shall comply with the standard conditions of supervised release adopted by the Court on January 3, 1990, and the following special condition:

1) The defendant shall not possess firearms, explosives, or other dangerous weapons.

Based on the defendant's lack of financial resources, the Court will not impose a fine or an additional fine which will pay government costs of any imprisonment or supervised release.

The Court finds the defendant is a flight risk and a danger to the community; therefore, voluntary surrender shall not be granted.

The defendant shall be remanded to the custody of the U.S. Marshals to be returned to the State of New Mexico.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on Page Three of this judgment are imposed.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA

v.

MARIO PEREZ

Name:	Mario Perez
DOB:	March 21, 1965
SSN:	592-44-9801
Co. Reg. To Vote	Santa Fe. County
Mailing Address:	P. O. Box 1059 Santa Fe, New Mexico 87504-1059 (In custody, U. S. Marshal Service)
Residence Address:	P. O. Box 1059 Santa Fe, New Mexico 87504-1059

Roberto Albertorio—Appointed Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

Filed: 10-20-93

__guilty __nolo contendere as to count(s) _____

X not guilty as to count(s) I, II and VI of Indictment 92-236JC filed on May 8, 1992

THERE WAS A:

__finding X verdict of guilty as to count(s) I, II and VI of Indictment 92-236JC filed on May 8, 1992

__As tried to the Court. X As tried before a jury.

THERE WAS A:

__finding __verdict of guilty as to count(s) _____

__Judgment of acquittal as to count(s) _____

The defendant is acquitted and discharged as to this/thes count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: (Fel. X Misd.__)

Conspiracy to Possess with Intent to Distribute less than 50 kilograms of Marijuana, in violation of 21 USC 846, and Aiding and Abetting, in violation of 18 USC 2, as charged in Count I; Carry or Use of a Firearm During or in Relation to a Drug Trafficking Crime, in violation of 18 USC 924(c)(1), 18 USC 924(a)(2), and Aiding and Abetting, in violation of 18 USC 2, as charged in Count II; Possession with Intent to Distribute less than 50 kilograms of Marijuana, in violation of 21 USC 841(a)(1) and 21 USC 841(b)(1)(D), as charged in Count VI, of Indictment 92-236JC filed on May 8, 1992.

The Court adopts the factual findings and guideline applications in the presentence report and finds that there is no need for an evidentiary hearing as there are no disputed facts.

The Court finds that the offense level is twenty-five (25) and the criminal history category is III, establishing a guideline imprisonment range of seventy (70) to eighty-seven (87) months. The Court also finds that pursuant to 18 U.S.C.§ 924(c)(1), Count II is to run consecutively to any other sentence imposed. The Court takes judicial notice that the defendant has developed a pattern of criminal behavior revolving around drug distribution and violence. In the instant offense, a law enforcement officer was restrained and threatened with his life as the defendant attempted to purchase 45 kilograms of

marijuana without payment. The sentence imposed will reflect the sentencing goals of punishment, deterrence, and protection of the public.

Therefore, pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court as to Counts I and VI of Indictment 92-236JC, that the defendant, Mario Perez, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of eighty-seven (87) months, said sentences to run concurrently, one with the other, and, pursuant to 5G1.3(b) of the sentencing guidelines, concurrently with the State of New Mexico sentence for which he is currently confined. As to Count II, the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of sixty (60) months, said sentence is to run consecutively to the sentence imposed on Counts I and VI and consecutively to the State of New Mexico sentence for which he is currently confined. Upon release from confinement, the defendant shall be placed on supervised release for a term of three (3) years as to each count, said terms to run concurrently, one with the other. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the nearest U.S. Probation Office in the district to which he is released, if the defendant is not deported. If the defendant is deported and reenters the United States during the period of supervised release, he is to report to the nearest U.S. Probation Office immediately to commence his term of supervised release. Further, if the defendant is deportable, it is recommended that the Immigration and Naturalization Service initiate deportation proceedings prior to the defendant's release from custody. While on supervised release, the defendant shall not commit any federal, state, or local crime, shall not possess illegal controlled substances, shall comply

with the standard conditions of supervised release adopted by the Court on January 3, 1990, and the following special conditions:

1) The defendant shall not possess firearms, explosives, or other dangerous weapons.

2) The defendant shall participate as directed in a program for substance abuse approved by the U.S. Probation Office, which may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

Based on the defendant's lack of financial resources, the Court will not impose a fine or an additional fine which will pay government costs of any imprisonment or supervised release.

The Court finds the defendant is a flight risk and a danger to the community; therefore, voluntary surrender shall not be granted.

The defendant shall be remanded to the custody of the U.S. Marshals for service of sentence.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on Page Three of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) Refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer.

(2) Associate only with law-abiding persons and maintain reasonable hours.

(3) Work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability.

(When out of work notify your probation officer at once, and consult him prior to job changes).

(4) Not leave the judicial district without permission of the probation officer.

(5) Notify your probation officer immediately of any changes in your place of residence.

(6) Follow the probation officer's instructions and report as directed.

The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

It is further ordered that the defendant shall pay to the United States a Special Assessment of $50.00 as to each of Counts I, III and VI, for a total of $150.00, which shall be due immediately and payable by cashier's check, bank or postal money order to the United States District Court Clerk, Post Office Box 689, Albuquerque, New Mexico 87103.

Original Fine Amount: _____

Amount Due: _____

Schedule of Payments: _____

Original Restitution Imposed: _____

Amount Due:_____

Payable To: _____

Schedule of Payments: _____

IT IS FURTHER ORDERED that until the judgment is paid in full, the defendant shall notify the United States Attorney of any change in address within 30 days of that change.

IT IS FURTHER ORDERED that count(s) _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the clerk of the Court deliver a certified copy of the judgment to the United States Marshal of this district.

__The Court orders commitment to the custody of the Bureau of Prisons and reconunends:

October 6, 1993
Date of Imposition of Sentence

_____
Signature of Judicial Officer

John E. Conway, United States District Judge
Name and Title of Judicial Officer

Date: October 18, 1993

In accordance with Rule 32(a)(2) of the Federal Rules of Criminal Procedure, you have the right to appeal the entry of this judgment within ten (10) days. Further, pursuant to 18 USC 3742, within ten (10) days of the entry of the judgment, you have the right to appeal the final sentence of this Court imposed on an offense for

which a sentencing guideline has been issued by the Sentencing Commission pursuant to 28 USC 994(1). You have the right to apply for leave to appeal *in forma pauperis* if unable to pay the cost of an appeal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at, _____, the institution designated by the Bureau of Prisons, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marhsal

BY: _____

Deputy Marshal

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) Refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a lawenforcement officer.

(2) Associate only with law-abiding persons and maintain reasonable hours.

(3) Work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability.

(When out of work notify your probation officer at once, and consult him prior to job changes).

(4) Not leave the judicial district without permission of the probation officer.

(5) Notify your probation officer immediately of any changes in your place of residence.

(6) Follow the probation offcer's instructions and report as directed.

The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

It is further ordered that the defendant shall pay to the United States a Special Assessment of $50.00 as to each of Counts I, II and VI, for a total of $150.00, which shall be due immediately and payable by cashier's check, bank or postal money order to the United States District Court Clerk, Post Office Box 689, Albuquerque, New Mexico 87103.

Original Fine Amount: _____
Amount Due: _____
Schedule of Payments: _____

Original Restitution Imposed: _____
Amount Due: _____
Payable To: _____

Schedule of Payments: _____

IT IS FURTHER ORDERED that until the judgment is paid in full, the defendant shall notify the United States Attorney of any change in address within 30 days of that change.

IT IS FURTHER ORDERED that count(s) _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the clerk of the Court deliver a certified copy of the judgment to the United States Marshal of this district.

__The Court orders commitment to the custody of the Bureau of Prisons and recommends:

October 6, 1993
Date of Imposition of Sentence

_____
Signature of Judicial Officer

John E. Conway, United States District Judge
Name and Title of Judicial Officer

Date: October 18, 1993

In accordance with Rule 32(a)(2) of the Federal Rules of Criminal Procedure, you have the right to appeal the entry of this judgment within ten (10) days. Further, pursuant to 18 USC 3742, within ten (10) days of the entry of the judgment, you have the right to appeal the final sentence of this Court imposed on an offense for which a sentencing guideline has been issued by the Sentencing Commission pursuant to 28 USC 994(1). You have the right to apply for leave to appeal *in forma pau-*

peris if unable to pay the cost of an appeal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, the institution designated by the Bureau of Prisons, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By: _____
Deputy Marshal

UNITED STATES v. GONZALES, MIGUEL, ET AL.

95-1605

Supreme Court of the United States

Monday, June 17, 1996

The motion of respondent Miguel Gonzales for leave to proceed in forma pauperis is granted. The motion of respondent Orlenis Hernandez-Diaz for leave to proceed in forma pauperis is granted. The motion of respondent Mario Perez for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted.